ne Court, U.S.
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No. 00 395 AUG 3 0 2000

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In The Supreme Court of the United States

GENE WILLARD GAYLOR,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Greenbriar County, West Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Circuit Court of Greenbrier County West Virginia err in failing to grant petitioner's motion to dismiss on account of pre-indictment delay and in then failing to grant either a new trial or a judgment of acquittal after the jury had rendered its verdict?

PARTIES TO THE PROCEEDINGS

Petitioner Gene Willard Gaylor ("the petitioner"), is currently serving a life sentence without possibility of parole on account of the conviction which forms the basis of this Petition.

Respondent State of West Virginia ("the respondent"), is the body politic which prosecuted the crimes of which petitioner was convicted.

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IN THE
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STATE OF WEST VIRGINIA,

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GENE WILLARD GAYLOR,

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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Petitioner Gene Willard Gaylor hereby petitions this Court for a Writ of Certiorari to the Circuit Court of Greenbrier County, West Virginia.

OPINIONS BELOW

The West Virginia Supreme Court of Appeals' Order (Appendix ["App."] A), filed on May 2, 2000, denied by a vote of 4-1 petitioner's Petition for Appeal of a Disposition Order (App. C), rendered on June 24, 1999 by the Circuit Court of Greenbrier County, West Virginia which in turn denied petitioner's motions for a judgment of acquittal or in the alternative for a new trial (App. L).

JURISDICTION

On appeal from a Disposition Order (App. C), rendered by the Circuit Court of Greenbrier County, West Virginia which denied petitioner's motions for a judgment of acquittal or in the alternative for a new trial and of the trial court's earlier decision to dismiss the prosecution on account of preindictment delay, the Supreme Court of Appeals of West Virginia denied petitioner's Petition for Appeal with one dissenting vote on May 2, 2000 (App. A). An extension of time until August 30, 2000 within which to file this Petition was granted by the Chief Justice pursuant to Supreme Court Rule 13.5. This petition is accordingly filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§ 1257(a), 2101(d).

Although an Amended Petition for Appeal was presented to the Supreme Court of Appeals of West Virginia, that court declined to grant this petition so as to hear petitioner's appeal. Accordingly, petitioner understands his appeal to this Court to lie from the Circuit Court of Greenbrier County, West Virginia. *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60, 74 S.Ct. 396, 397-98, 98 L.Ed. 583 (1954); *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 44 S.Ct. 11, 12, 68 L.Ed. 140 (1923). Accordingly, he styles his Petition for Certiorari as one to the State trial court. If, on the other hand, the Court determines that, notwithstanding *Calvert* and *Levee*, certiorari is more properly directed to the West Virginia Supreme Court of Appeals, petitioner respectfully asks the Court to construe this Petition as one seeking the issuance of a writ of certiorari to that tribunal.

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT V, PROVIDES IN PERTINENT PART:

No person shall be ... deprived of life, liberty, or property, without due process of law[.].

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, PROVIDES IN PERTINENT PART:

Section 1. ... No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WEST VIRGINIA CODE § 61-2-1 (2000 repl. vol.), PROVIDES IN PERTINENT PART:

Murder ... by any willful, deliberate and premeditated killing ... is murder of the first degree. All other murder is murder of the second degree.

STATEMENT OF THE CASE

This Petition seeks review of a criminal conviction resulting from a jury trial held in June 1999 in the Circuit Court of Greenbrier County, West Virginia. *See* Sentencing Order (App. E). The gravamen of petitioner's request for review lies in the fact that some 22½ years elapsed between the crimes of which he was accused and his indictment for

those crimes. It is to be noted in this regard that the identity and whereabouts of petitioner have been known to the authorities since shortly after the bombing because he was known to them then and has in addition been in the custody of the Federal prison system since May 1978.

The trial resulted from an indictment (App. H), handed down in August 1998 for the crimes of murder, conspiracy to commit murder, conspiracy to inflict injury, and possession of explosives with criminal intent. The indictment dealt with factual allegations concerning the alleged murder by the use of an explosive device on February 5, 1976 in Rupert, West Virginia of one Billy Ray Abshire. The petitioner was convicted of murder in violation of W.Va. Code § 61-2-1 (2000 repl. vol.), along with other offenses, and sentenced to life in prison without the opportunity for parole.

Mr. Abshire's bombing death was immediately and initially investigated by both state and federal authorities. Sergeant Miles Kochenderfer of the West Virginia State Police was assisted by Alcohol, Tobacco & Firearms ("ATF") agents Andrew J. Beck, Jr. and Jerry Gantenbein of the West Virginia ATF Division, and Agent George Baxter of the Virginia ATF Division. Sergeant Kochenderfer filed a report on March 1, 1976 (App. P), in which he concluded that "[a]t this time, the investigating officers have no further leads to pursue, however, the case is still being investigated" (A-96).

In fact, Sgt. Kochenderfer did little or nothing more on the case besides appearing at a 1978 Federal grand jury proceeding in Richmond, Virginia which is discussed in greater detail below. Sergeant Kochenderfer simply stated that he intended to let the "Feds" handle the case. Motions Hearing Transcript on Pre-Indictment Delay (February 10-11,

1999) p. 188 ("*MTH*") (App. R; A- 118). This was because Sgt. Kochenderfer had met with Greenbrier County Prosecuting Attorney Edgar Smith shortly after completing his report; the two decided to defer to the Federal System because the crime was subject to the death penalty under Federal law whereas West Virginia did not have the death penalty for any crime. *MTH* pp. 160-61 (A-119-A-120).

ATF Agent Beck also wrote a report on the bombing dated August 6, 1976 (App. N). After describing the evidence, Beck concluded that "[a]fter exhausting all possible leads, and sorting all evidence and fact, the only logical conclusion is that Billy Abshire killed himself accidently" (A-64).

Notwithstanding, ATF Agent Baxter began sometime after July 1977 to suspect that petitioner had been a participant in the bombing and discussed the matter with West Virginia State investigators. ATF Agents Beck and Gantenbein met with petitioner at the Holiday Inn in Covington, Virginia in March 1978 at petitioner's request. Petitioner verbally gave incriminating statements regarding his involvement in the Billy Ray Abshire bombing at this meeting. *See MTH* pp. 89-94 (A-110- A- 114).

In any event, Petitioner was convicted in the United States District Court for the Western District of Virginia on May 15, 1978 for attempting to extort money from Carroll Eugene Humphries, a gentleman who was also a defendant in the case on appeal to this Court. After the conviction, Clayton Gaylor, petitioner's brother, himself pled guilty to attempting to extort money from Mr. Humphries; the guilty plea resulted from testimony given by Clayton Gaylor at petitioner's trial. Clayton Gaylor received a fifteen-year sentence as a result.

These facts made Clayton Gaylor a likely witness in the Billy Ray Abshire killing investigation. In fact, Clayton Gaylor was interviewed by a State Farm insurance investigator in 1979. In his report (App. Q), the investigator stated that Clayton Gaylor had in his interview "inferred that [Carroll] Humphries had arranged for [Billy Ray] Abshire's death and had agreed to pay $8,000.00 for the 'job'" (A-105).

A Federal grand jury met in Richmond, Virginia during the week of May 22-26, 1978 to investigate these events. The records of this grand jury proceeding have all been destroyed, however.

On May 31, 1978, ATF Agent Baxter wrote a report which sets out many of these facts (App. O). In that report Agent Baxter indicated that Sgt. Miles Kochenderfer had been present at the May 1978 grand jury proceedings to represent the State of West Virginia (A-73).

Mr. Baxter also indicated that petitioner had met with Assistant United States Attorneys for West Virginia, North Carolina, and Virginia on May 12, 1978 (A-67). In that meeting, Mr. Baxter asserted that, under condition of immunity, petitioner told these officials that he had been hired by Mr. Humphries to kill Billy Ray Abshire (A-68).

In addition, Agent Baxter testified at the Pre-Indictment Delay hearing that West Virginia authorities were fully appraised of these facts:

> Q Did you ever discuss the prosecution of Gene Willard Gaylor, Robert Vernon Brown, Katherine Abshire, or Carroll Humphries with Mr. Kochenderfer?

A Yes, sir. Any information I obtained in my locality that pertained to West Virginia, I referred to Mr. Kochenderfer.

MTH p. 25 (A-115). Neither Sgt. Kochenderfer nor any other State official acted upon these data, however. Notwithstanding, Sgt. Tincher of the West Virginia State Police testified that Sgt. Kochenderfer had told him that he was convinced the petitioner had killed Billy Ray Abshire. *MTH* p. 124 (A-124).

There is no evidence of meaningful State activity regarding the crime between 1978 and 1998. The ATF officially closed its file on September 30, 1981. *MTH* pp. 49-50 (A-122-A-123). Agent Baxter likewise closed his file in September 30, 1981, and undertook no further investigation. *MTH* p. 51 (A-121).

Agent Baxter did, however, state at the 1999 hearing that he had testified at petitioner's parole hearing in 1988; He testified that he had talked with Sgt. Kochenderfer about contacting witnesses and informing them that petitioner was seeking parole; the thought was that some of these witnesses might offer information out of fear of petitioner's release from prison. *MTH*, pp. 31-32 (A-123-A-124). Nothing was done by either Sgt. Kochenderfer or any other State official at this time, however.

In the meantime, petitioner's brother Clayton Gaylor had written a letter to federal district judge James C. Turk (App. M). In that letter, Clayton Gaylor told Judge Turk that "[t]he information I have is very important on the extortion case and some very, very, important other crimes, like, who made the bomb, who let the bomb off, who wrote the letter,

who killed Abshire" (A-57). This letter was filed in the Clerk's office for the United States District Court for the Western District of Virginia in Roanoke, Virginia on September 21, 1978, where it became a readily available public record. It was clearly an unconditional offer to provide information about the bombing. It was never acted upon, however, by West Virginia authorities.

Nothing happened, in fact, until April 1998 when Sgt. Michael Spradlin of the West Virginia State Police was appointed to an old case investigation unit. The investigation of the Abshire bombing was reopened on July 3, 1998. On July 22, 1998, Circuit Judge Frank Jolliffe signed an order convening a special grand jury on August 27, 1998, for the primary purpose of indicting petitioner and other potential defendants in the case. *MTH*, pp. 199-200 (A-127-A-128).

Sergeant Spradlin claimed to have new evidence in the form of statements from petitioner's wife Carol Gaylor and his brother Clayton Gaylor. *MTH* p. 199 (A-127). These statements were taken from Mrs. Gaylor on August 14, 1998 and from Clayton Gaylor on August 16, 1998. *MTH* p. 195 (A-127). Yet both witnesses had been available to the State for years. Mrs. Gaylor had lived in the Covington, Virginia area since 1976 and was available for questioning had she only been contacted for that purpose. Sergeant Spradlin testified, however, that no one from West Virginia had ever attempted over the years to interview her. *MTH* p. 195 (A-128).

Sergeant Spradlin also testified that no one from West Virginia had ever tried to interview or question Clayton Gaylor prior to this 1998 interview. *MTH* p. 195 (A-128). Yet Clayton Gaylor averred in a sworn statement which later indicted his brother that he would have talked with the

authorities during this 22½ year period if he had only been asked to do so (Transcript of Sworn Statement of Clayton Gaylor, taken on January 9, 1999 [App. S] p. 42; A-129). Clayton Gaylor also testified that he had not only been willing for years to talk about the case (*id.*), but that all the information he had about the bombing during his brother's trial was entirely information he had known since 1976 (*id.* p. 43; A-129).

Prior to the trial in State court, petitioner had filed a Defendant's Motion to Dismiss the Indictment (App. I). He also filed a Memorandum of Defendant, Gene Willard Gaylor, in Support of his Motion to Quash the Indictment ("the Memorandum")(App. J), which fleshed out the points made in the Motion.

Petitioner set out some fourteen examples of prejudice which he suffered as a minimum on account of the 22½ year pre-indictment delay (Memorandum at 3-4; A-34-A-36). Petitioner noted in the Memorandum that eight of his potential witnesses had died in the interim (A-35). He noted that the delay precluded him from impeaching the State's chief witness on account of an earlier arson conviction (A-35). He noted as well that this witnesses' psychiatric history and treatment records were no longer available (A-36). He noted that "[t]he state seeks to offer Rule 404(b) evidence, which the Defendant, due to the passage of time, death of witnesses, loss of evidence, cannot adequately rebut" (A-35). Petitioner also noted that "[n]o original reports concerning testing performed on the vehicle, bomb and/or other related materials are available" (A-36). He noted in addition that "[n]umerous records, reports, physician's evidence and other information is either lost, destroyed or otherwise unavailable" (A-36).

Petitioner observed that "[t]he foregoing examples merely represent the tip of the iceberg" (A-36). Finally, he concluded that "[t]he Defendant has clearly suffered irreparable prejudice as a result of the excessive delay in charging him with this crime" (A-36).

As noted above, a hearing was held on the motion on February 10-11, 1999. On April 6, 1999, the trial court issued an Order Denying Defendant's Motion to Dismiss the Indictment ("the Order")(App. F).

The court considered two possible bases for a dismissal, of which only the first is presently relevant. *Cf.* Order Denying Defendant's Motion to Dismiss the Indictment on Additional Grounds (App. G), filed on July 23, 1999, for a discussion of the second ground. For present purposes, the relevant basis is "the 22½ year delay between the date on which the crime was allegedly committed, and the date on which the indictment was returned in this case" (Order at 1; A-14). With respect to that issue, the trial court made the following findings:

1. Due to the length of the delay, a presumption of prejudice to Defendant arises pursuant to West Virginia law, but this presumption has been rebutted by the State;

2. The state lacked sufficient evidence to convict Defendant at any time prior to August 1998; and

3. The State did not intentionally delay prosecution of this case to gain a tactical advantage over Defendant.

(Order at 2; A-15). As a consequence, the trial court ruled, "Defendant's Motion to Dismiss Indictment is hereby denied on the issue of pre-indictment delay" (Order at 2; A-15-A-16).

Petitioner thereupon filed a Petition for Writ of Prohibition and Motion for Rule to Show Cause in the West Virginia Supreme Court of Appeals on May 18, 1999 (App. K). This petition was denied by the Supreme Court of Appeals of West Virginia in an Order (App. B), dated May 19, 1999.

As a result, a trial was held on June 7-10, 1999. After hearing and weighing the evidence, the jury found petitioner guilty of (1) murder in the first degree; (2) conspiracy to commit murder; and (3) possession of explosives with criminal intent (Judgment Order; App. D).

Petitioner then filed a Motion for a New Trial Pursuant to Rule 33, Rules of Criminal Procedure and Motion for Judgment of Acquittal Pursuant to Rule 29, Rules of Criminal Procedure on June 18, 1999 (App. L). The motions were denied in a Disposition Order (App. C), filed on June 24, 1999. The unsuccessful filing of a Petition for Appeal in the Supreme Court of Appeals of West Virginia then ensued, *see* App. A, followed by this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This case presents a significant and widely-debated issue regarding the permissible amount of delay that can constitutionally elapse between the commission of a crime and a criminal indictment for that act. Specifically, the issue before the Court under these facts is whether a defendant may, consistent with due process, be required to prove not simply prejudice as a result of the delay but also improper prosecutorial motive as the cause of the delay so as to be entitled to have his prosecution terminated on account of that delay. This is an issue upon which both the circuit courts of appeals and state appellate courts have reached disparate results and as to which this Court has not yet spoken.

Under West Virginia law as applied by the trial court, the delay in this case was presumptively prejudicial:

> A delay of eleven years between the commission of a crime and the arrest or indictment of a Defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the Defendant and violates his right to due process of law, United States Constitution, Amendment XIV, and West Virginia Constitution, Articles 3 and 10. The presumption is rebuttable by the Government.

Syl. Pt. 1, *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W.Va. 1980). It is thus clear under West Virginia law that a delay of 22½ years is clearly "presumptively prejudicial" to

the petitioner, and indeed the trial court agreed with that assessment (Order at 2; A-15).

This rule embodies relevant federal standards as announced in this Court. The rule is that "[t]he right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." *Dickey v. Florida*, 398 U.S. 30, 38, 90 S.Ct. 1564, 1569, 26 L.Ed.2d 26 (1970)(speedy trial case). In *Dickey*, as here, "no valid reason for the delay existed; it was exclusively for the convenience of the State." 398 U.S. at 38, 90 S.Ct. at 1569. Hence, when coupled with "actual prejudice to petitioner," *id.*, *id.*, including "the death of two potential witnesses, unavailability of another, and the loss of police records," *id.*, *id.*, the conviction in *Dickey* was overturned and a dismissal of the charges decreed. A similar result is mandated here on the even more egregious facts of the case at hand

Petitioner acknowledges that the case law typically requires a showing that the delay significantly prejudiced the defendant's defense. *But see People v. Townsend*, ___ A.D.2d ___, 705 N.Y.S.2d 113, 114-15 (2000)("An unreasonable delay in prosecuting a defendant constitutes a denial of due process and may mandate dismissal of the indictment even in the absence of actual prejudice to the defendant;" unnecessary fifteen-month delay required "dismissal of the indictment despite the lack of evidence that defendant suffered actual prejudice").

Petitioner does acknowledge that the trial court in this case determined that "this presumption [of prejudice] has been rebutted by the State" (Order at 2; A-15). Yet this rebuttal was not under West Virginia law a rebuttal of the fact that petitioner was in fact prejudiced; the record, after all, is

replete with unrebutted evidence of prejudice in the form of deceased witnesses and destroyed evidence and records.

Rather, the trial court rested its finding of rebuttal on two additional prongs of the West Virginia test. First, the trial court found that "[t]he State lacked sufficient evidence to convict Defendant at any time prior to August 1998 (Order p. 2; A-15). The West Virginia test may thus favor criminal defendants to a degree greater in this regard than the holding in *United States v. Lovasco*, 431 U.S. 783, 790-96, 97 S.Ct. 2044, 2048-50, 52 L.Ed.2d 752 (1977), which announced that prosecutors are given wide latitude as to when to initiate a prosecution. In the Court's view, a particular decision to delay a prosecution will violate a defendant's due process only when it "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" 431 U.S. at 790, 97 S.Ct. at 2049, *quoting Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935).

Under West Virginia law, by contrast, the principle is that:

> "It is the government's duty to proceed with reasonable diligence in its investigation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right."

Syl. Pt. 1, *State v. Carrico*, 189 W.Va. 40, 427 S.E.2d 474 (1993), *quoting State ex rel. Leonard v. Hay*, *supra*, 269 S.E.2d at 398.

In the case at hand, the record is clear that the State had nearly all the evidence there was to get in this case by 1978, some twenty years **before** the indictment. The State, it is true, pointed to the 1998 interviews with Clayton Gaynor and Carol Gaynor (*MTH* p. 199; A-127), as having provided the evidence necessary to proceed with the indictment. Yet as we have seen, Clayton Gaynor had been fairly begging to talk with the authorities for some twenty years; he could, however, interest no takers in his offer. Mrs. Gaynor, as we have also seen, was known to be living in Covington, Virginia since 1976; yet no West Virginia authorities bothered to interview her during the ensuing 22 years (*MTH* p. 195; A-128).

Thus, the finding that the State lacked evidence to convict prior to August 1998 is true, if at all, **only** in the sense that the evidence was before the State's very eyes but that the State simply could not be bothered to examine it, let alone to utilize it. Indeed, a better reading of the record discloses that a conviction could just as easily have been obtained without those two 1998 interviews than with them.

Still, it is not clear that this Court would apply this *Carrico/Hay* test to the facts of this case with the same stringency as was done by the West Virginia Court. This Court's standards as set out under *Lovasco* appear to give prosecutors greater leeway than would West Virginia courts under *Carrico* and *Hay*. Still, the facts of the present case are so egregious that petitioner submits that they flunk even the *Lovasco* test. This conclusion issues from the fact that West Virginia adopted the four-part due diligence test articulated in the speedy trial case of *Barker v. Wingo*, 407 U.S. 514, 530-32,. 92 S.Ct. 2182, 2192-93, 33 L.Ed.2d 101 (1972). *See State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829, 830

(1982). The record in this case makes it more than clear that the State cannot satisfy the *Barker* due diligence test. A reversal of the judgment below is therefore warranted on this ground alone.

In fact, however, this reliance by the trial court on the sufficiency of the evidence in the sense intended under *Carrico* and *Hay* is not crucial to the most critical due process aspect of this case. The most relevant question was asked and answered by the trial court when it declared that "[t]he state did not intentionally delay prosecution of this case to gain a tactical advantage over Defendant" (Order p. 2; A-15). It is therefore points (1) and (3) of the Order that are most critical to the issues raised in this Petition.

This is because, for purposes of due process, the Supreme Court of Appeals of West Virginia inexorably links prejudice to the defendant on account of the delay with the existence of a prosecutorial motive for that delay which was intended to provide a tactical advantage over the accused. As the West Virginia court explained:

> To rebut the presumption of prejudice established in *Leonard*, in *Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573 (1989), we held the State need only demonstrate that delay was not orchestrated "to gain a tactical advantage over the defendant."

State ex rel. State v. Hill, 201 W.Va. 95, 491 S.E.2d 765, 776 (1997). Thus, even though petitioner had in this case undeniably demonstrated great prejudice from the delay in his indictment, the mere fact that, in the trial court's view, "[t]he

State did not intentionally delay prosecution of this case to gain a tactical advantage over Defendant" (Order at 2; A-__), served to insulate the indictment from any due process attack. The rule applied by the trial court as extrapolated from *Hill* and *Hundley* therefore provides that **no** amount of prejudice on account of pre-indictment delay can violate a defendant's due process rights so long as the delay itself was not "orchestrated" by the State for purposes of gaining a "'tactical advantage,'" 491 S.E.2d at 776, over the defendant.

It should be noted in this review of State law that West Virginia continues to adhere to this view of the matter. *See* Syl. Pt. 3, *State v. Davis*, 205 W.Va. 569, 519 S.E.2d 852 (1999)(fifteen-year delay between commission of crime and indictment did not violate due process).

The West Virginia rule is said to be "nothing more than a recognition of the due process standard articulated" by this Court in *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). *See Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573, 577 (1989). Even though the rule has been ostensibly adopted by various federal circuits and state appellate courts, *id.* n.6, petitioner urges the Court to find that the rule requiring a finding of prosecutorial misconduct for tactical advantage as part of the due process calculus in fact misreads *Gouveia* so as to place an impermissible burden upon criminal defendants who like petitioner find themselves the victims of a highly prejudicial pre-indictment delay.

That is, the Court did indeed state in *Gouveia* that the Fifth Amendment mandates the dismissal of an indictment where the defendant proves both actual prejudice and intentional delay for purposes of gaining an advantage over the defendant. *United States v. Gouveia*, *supra*, 467 U.S. at

192, 104 S.Ct. at 2299. The statement, however, was dicta that is best read as merely defining the outer boundaries of unconstitutional preindictment delay. The actual question before the Court involved the inmates' Sixth Amendment right to an attorney while those inmates were being held in administrative custody waiting to be indicted for crimes committed in prison. The dictum in *Gouveia* is therefore too thin a reed to support a resolution of the issues raised by this Petition. *But see* similar dicta in *United States v. $8,850*. 461 U.S. 555, 563, 103 S.Ct. 2005, 2011, 76 L.Ed.2d 143, 151 (1983)(ascribing "unfair tactical advantage rule" to *Lovasco*).

It is true that both federal circuit courts of appeals and state appellate courts are divided over this issue. Petitioner urges the Court to grant this Petition so that all lower courts – federal **and** state – can receive guidance on this point. Petitioner, in other words, urges the Court to find that to require a finding of both prejudicial delay **and** improper prosecutorial before a due process violation can be found is itself inconsistent with due process. Rather than setting up an a priori set of artificial twin hoops through which a defendant must jump in order to establish a delay of constitutional dimensions, an unconditional case by case analysis of **all** the facts of a case is more consistent with the Court's approach to such questions generally.

Such a rule would recognize in particular the fact that while long delays are nearly always prejudicial to **some** degree, a defendant facing a delay of the magnitude in this case is doubly hampered in attacking his indictment because of the inherent difficulty in unearthing proof of the State's actual motive and/or justification for the delay. The rule suggested by petitioner and followed in many courts would be

more faithful to the realities of the situation in which a defendant like petitioner finds himself.

Indeed, this has long been the Court's approach in this specific area, as follows:

> [W]e need not, and could not now determine when and in what circumstances actual prejudice resulting from preaccusation delays requires dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.

United States v. Marion, 404 U.S. 307, 324-25, 92 S.Ct. 455, 465-66, 30 L.Ed.2d 468 (1971). Likewise, the Court in *Lovasco* eschewed a black-letter test for identifying constitutionally illicit preindictment delay for the inductive approach of subjecting all the facts to a searching due process inquiry. *United States v. Lovasco*, *supra*, 431 U.S. at 790, 97 S.Ct. at 2048.

The unnecessarily artificial scheme announced by the West Virginia court in *Hundley* and *Hill*, and then applied to this case in the trial court, is patently inconsistent with such an approach. Surely, a highly serious and prejudicial delay should be enough, standing alone, to violate due process even in the

absence of improper prosecutorial motive. As a circuit court which follows this more flexible approach pointed out:

> Applying these principles of due process to the case at hand, we cannot agree with the position taken by ... those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation. Taking the position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove prosecutorial motive.

Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016, 111 S.Ct. 590, 112 L.Ed.2d 595 (1990).

The appeals court then observed that "[t]he better position ... is to put the burden on the defendant to prove actual prejudice." *Id.* In the case at hand, petitioner has not only accomplished that task but the trial court, using the peculiar West Virginia formulation, acknowledged that fact (Order at 2; A-15).

The court in *Howell* then continued by stating that "[a]ssuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's delay." *Id.* Under the mechanical approach taken by the trial court in this case – one that was concededly mandated by precedent – this balancing process was never undertaken at all. As a result, the trial court did not even entertain evidence as to prejudice.

The record in this case discloses many possible reasons for the pre-indictment delay in this case. It may result from sheer lethargy or inattention on the part of the State. It may result from a simple desire to let the Federal government shoulder the burden and its attendant costs. It may result from simple prosecutorial negligence. *See* Grand Jury Proceedings held on August 27, 1998 (App. T), pp. 50-51 (A-130-A-131).

On the other hand, the record also suggests that a desire to engineer the imposition of the death penalty upon petitioner may have provided a motive for delay. The fact that petitioner was incarcerated for most of the 22½ year period in question may have motivated the State to allow the potentially exculpatory evidence to go stale in light of the fact that (a) petitioner was safely tucked away in federal prison while (b) the evidence the prosecutors needed for a conviction was safely at hand.

In terms of the justification for the delay, the record discloses no basis whatever for a continuing investigation excuse. *See United States v. Lovasco, supra*, 431 U.S. at 787, 97 S.Ct. at 2047. Certainly, the unavailability of the accused is not a factor in this case. *See Dickey v. Florida, supra*, 398 U.S. at 36, 90 S.Ct. at 1568. Only when those various factors are balanced against the delay can a proper due process

analysis result. In that analysis, however, the better rule is that "'mere inconvenience' or prosecutorial negligence does not constitute sufficient justification for preindictment delay." *United States v. Holland*, 985 F.Supp. 587, 598 (D.Md. 1997).

The question of causation and motive are obviously important in this due process calculus. As this Court has plainly said, "*Barker* made it clear that 'different weights [are to be] assigned to different reasons' for delay." *Doggett v. United States*, 505 U.S. 647, 657, 112 S.Ct. 2086, 2093, 120 L.Ed.2d 520 (1992), *quoting Barker v. Wingo, supra*, 407 U.S. at 532, 92 S.Ct. at 2192.

At the same time, the State may object that because the trial court found that "[t]he State did not intentionally delay prosecution of this case to gain a tactical advantage over Defendant" (Order at 2; A-15), no balancing is called for at all. That is, the State may assert, because the trial court found no **intentional** preindictment delay, petitioner's due process rights remained unviolated by definition.

This view, however, overlooks the fact that delay can by itself have determinative due process implications:

> Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. This, our

> toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority.

Doggett v United States, *supra*, 505 U.S. at 657, 112 S.Ct. at 2093. *Doggett* is a speedy trial case turning on Sixth Amendment considerations. There is no reason, however, why the same analysis cannot apply to the due process concerns in this case. Only a full balancing of the prejudice to the defendant occasioned by the delay with the justification for the state's part in the delay can safeguard due process rights. This balancing can and should be undertaken even if the state's part in the delay can be said to be unintentional or even negligent.

As noted above, both federal and state courts are in conflict over this issue. In his dissent in *Howell*, Judge Russell counted the First, Second, Third, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits among those circuits requiring a showing of intentional prosecutorial delay for tactical purposes as a prerequisite for dismissal of the indictment. 904 F.2d at 903 (Russell, J., dissenting). Judge Russell found the Fifth Circuit to be "inconclusive" on the issue while only the Fourth and Ninth Circuits "are said to have concluded that prosecutorial misconduct is 'not the *sine qua non* for a due process violation from prosecutorial delay." *Id.*

It should be noted, however, that the Seventh Circuit,

in whose decisions Judge Russell found "some waffling," *id.*, may have since gravitated to the camp of the Fourth and Ninth Circuits. *United States v. Sowa*, 34 F.3d 447, 450-51 (7th Cir. 1994), *cert. denied*, 513 U.S. 1117, 115 S.Ct. 915, 130 L.Ed.2d 796 (1995). *See United States v. Sabath*, 990 F.Supp. 1007, 1017 (N.D.Ill. 1998), where the court found that "[a] close reading of *Sowa* shows that it sits on the Fourth and Ninth Circuit's side of the split, where bad faith is not a prerequisite to a due process violation."

In addition, the Eighth Circuit seems to have been doing a bit of recent waffling itself in downplaying the "intentional delay for tactical advantage" requirement. *See United States v. Al-Muqsit*, 191 F.3d 928, 938 (8th Cir.), *cert. denied*, ___ U.S. ___, 120 S.Ct. 548, 145 L.Ed.2d 426 (1999); *United States v. Miller*, 20 F.2d 926, 931 (8th Cir.)(no apparent need to make a showing of improper prosecutorial motive), *cert. denied*, 513 U.S. 886, 115 S.Ct. 1363, 130 L.Ed.2d 152 (1994). A full expression of the Ninth Circuit's views on the subject can be seen in *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992).

Some twelve years ago, Justice White dissented from the denial of a petition for certiorari to explore this issue in *United States v. Hoo*, 825 F.2d 667 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1035, 108 S.Ct. 1035, 98 L.Ed.2d 777 (1988), on the ground that "[t]he continuing conflict among the Circuits on this important issue of constitutional law requires resolution by this Court." 484 U.S. at 1036, 108 S.Ct. at 742. Ten years ago, Justices White and Kennedy dissented from the denial of certiorari in *Howell v. Barker*, *supra*, 498 U.S. at 1016, 111 S.Ct. at 590 on presumably the same grounds. Since that time the circuit courts of appeals have continued to wrestle with this issue. *Compare United*

States v. Ross, 123 F.3d 1181, 1184-85 (9th Cir. 1997) (upholding balancing test that requires only "some government culpability"), *cert. denied*, 522 U.S. 1066, 118 S.Ct. 733, 139 L.Ed.2d 670 (1998) *with Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996)(court expressed disagreement with *Howell v. Barker*, *supra*, but followed the decision in that case nonetheless because "only the *en banc* court may overrule a prior panel decision"), *and United States v. Beckett*, 208 F.3d 140, 150-51 (3rd Cir. 2000)(applying "improper delay" test to turn away defendant's pre-indictment delay claims).

As also noted above, the state courts are similarly conflicted on this question; indeed, the conflict in the State courts seems even more pronounced than that among the circuits. *Compare Commonwealth v. Scher*, ___ Pa.Super. ___, 732 A.2d 1278 (1999)(twenty-year pre-arrest delay violated due process on account of memory loss and death of witnesses), *appeal granted*, ___ Pa. ___, 751 A.2d 189 (2000), *State v. Frazier*, 82 Wash.App. 576, 918 P.2d 964, 972-73 & n.14 (1996)("negligent delay may be sufficient to violate due process"), *and State v. Alexander*, 310 N.J.Super. 348, 708 A.2d 770, 773-74 (App.Div. 1998)("Because the Supreme Court of the United States has never resolved the conflict among the circuit courts of appeal ... we assume for the purpose of this opinion ... that a due process violation may be established by undue pre-indictment delay even though the cause of the delay is solely the negligence of the police or prosecutor") *with People v. Balken*, ___ A.D.2d ___, 705 N.Y.S.2d 590, 591 (2000)(applying "unfair tactical advantage" test), *Ibarra v. State*, 11 S.W.3d 189, 194 (Tex. Crim. App. 1999)(applying "unfair tactical advantage" test), *and De La Beckwith v. State*, 707 So.2d 547, 569-70 (Miss.

1997) (applying "intentional delay" standard), *cert. denied*, 525 U.S. 880, 119 S.Ct. 187, 142 L.Ed.2d 153 (1998).

In light of this continuing conflict in both the federal and state courts, petitioner urges the Court to find that this case provides the appropriate vehicle with which to resolve this controversy. The courts of this nation – federal and state alike -- are in obvious need of guidance on this issue. This case therefore offers an opportunity to resolve a conflict not only among the circuits but the states as well. A grant of this Petition would thus fulfil "[a] principal purpose for which we use our certiorari jurisdiction [which is] to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *United States v. Braxton*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991). The Court should, in other words, accept the invitation which it declined to accept in *Hoo* and *Barker* and grant the Petition for Certiorari that is now before it. *See* Supreme Court Rule 10.

At the same time that a grant of the Petition would foster important jurisprudential goals in general, it is also the case that an individual wrong would be addressed in particular. The record in this case clearly discloses that petitioner's due process rights have been grievously trampled by the extraordinary delay in this case. The trial court erred in requiring petitioner to prove a deliberate delay on the part of the State so as to gain a tactical advantage over him before it would consider the extreme prejudice to his defense that 22½ years of delay had necessarily engendered. At the same time, it is clear that the State is culpable in some degree for the delay in this case; it is at the least guilty of negligence – if not more.

As the trial court agreed and the record demonstrates, petitioner was actually and seriously prejudiced by this delay. Witnesses and evidence alike are now unavailable to him. He has lost a ability to examine physical evidence relating to the alleged crime, to examine evidence relating to the bomb, the vehicle in question, and the crime scene generally. Potentially exculpatory witnesses – including alibi witnesses -- have died, the memories of those witnesses who have not died have faded, government reports have been destroyed, bombing materials in the case are no longer in existence, and hotel and motel records have been destroyed. At the same time, his ability to plumb the State's motives for this delay is severely hampered as well.

Any balancing test that fairly weighs this 22½ preindictment delay against the State's excuses for this delay -- such as they are -- must result in a finding that petitioner's due process rights have been denied. The pending Petition should be granted by this Court so that this finding can ultimately be made upon a proper balancing of **all** the facts in this case.

CONCLUSION

Therefore, and for all the foregoing reasons, petitioner Gene Willard Gaylor respectfully requests that this Court issue a Writ of Certiorari to the Circuit Court of Greenbrier County, West Virginia.

Respectfully submitted,

GENE WILLARD GAYLOR

By Counsel

Barry L. Bruce
Barry L. Bruce and Associates
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Post Office Box 388
Lewisburg, West Virginia 24901
Telephone: (304) 645-4182
Attorney for Petitioner

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd of May, 2000, the following order was made and entered:

State of West Virginia, Plaintiff Below, Respondent

vs.) No. 993089

Gene Willard Gaylor, Defendant Below, Petitioner

On a former day, to-wit, November 17, 1999, came the petitioner, Gene Willard Gaylor, by Barry L. Bruce and J. Michael Anderson, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Greenbrier County, rendered on the 7th day of July, 1999, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Starcher would grant.

A True Copy

Attest: s/ DEBORAH L. McHENRY
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of May, 1999, the following order was made and entered:

State of West Virginia ex rel. Gene Willard Gaylor, Petitioner

vs.) **No. 991309**

Honorable James O. Holliday, Special Judge of the Circuit Court of Greenbrier County, and Mark Burnett, Prosecuting Attorney for Greenbrier County, Respondents

On a former day, to-wit, May 18, 1999, came the petitioner, Gene Willard Gaylor, by Barry L. Bruce and J. Michael Anderson, his attorneys, and presented to the Court his petition praying for a writ of prohibition to be directed against the respondents, the Honorable James O. Holliday, Special Judge of the Circuit Court of Greenbrier County, and Mark Burnette, Prosecuting Attorney for Greenbrier County, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioner is hereby refused.

A True Copy

Attest: /s/ Deborah L. McHenry

Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF GREENBRIER **COUNTY, WEST VIRGINIA**

STATE OF WEST VIRGINIA,

Plaintiff,

vs. **Criminal Action No. 98-F-52**

GENE WILLARD GAYLOR,

Defendant.

DISPOSITION ORDER

The State of West Virginia (the "State"), by its counsel, W. Mark Burnette and R. Kevin Hanson, prosecuting attorney and assistant prosecuting of Greenbrier County, respectively, and defendant GENE WILLARD GAYLOR (the "Defendant"), in person and by his appointed counsel, J. Michael Anderson and Barry L. Bruce, appeared before this Court on June 24, 1999 for a hearing on the Defendant's post-trial motions and for disposition.

On June 10, 1999, Defendant was convicted by a jury of three felony offenses. These offenses are: (1) murder of the first degree; (2) conspiracy to commit murder; (3) possession of explosives with criminal intent. On or about June 18, 1999, Defendant, through his counsel, filed a motion for judgment of acquittal, or in the alternative for a new trial.

The Court has reviewed the Defendant's post-trial motions, and it has heard the argument of counsel for both

Defendant and the State. After carefully considering Defendant's arguments, the Court is of the opinion that Defendant's motions should be denied. ACCORDINGLY, Defendant's post-trial motions for judgment of acquittal and for a new trial are hereby DENIED.

Having denied Defendant's post-trial motions, the Court then inquired of counsel for both the State and Defendant whether any of them knew of any reason that sentence should not be imposed upon Defendant at this time for his convictions of the felony charges of murder of the first degree, conspiracy to commit murder and possession of explosives with criminal intent. Counsel for the State and for Defendant responded that they knew of no reason that sentence should not be imposed at this time.

ACCORDINGLY, the Court hereby ORDERS as follows:

1. **For his conviction on Count 3 of the Indictment (possession of explosives with criminal intent), Defendant is hereby sentenced to the custody of the Commissioner of Corrections to be imprisoned in the penitentiary for a determinate period of (5) years. Defendant is also hereby fined in the amount of five hundred dollars ($500.00). This sentence of imprisonment shall run consecutively to the federal sentence that Defendant is currently serving so that he will begin serving this sentence upon his release from federal custody.**

2. **For his conviction of Count 2 of the Indictment (conspiracy to commit murder), Defendant is hereby sentenced to the custody of the Commissioner of Corrections to be imprisoned in the penitentiary for an indeterminate period of not less than (1) year nor more than five (5) years. Defendant is also hereby fined in the amount of ten thousand dollars ($10,000.00). This sentence of imprisonment shall run consecutively to the sentence imposed on Defendant for his conviction of Count 3 of the Indictment in this case so that he will begin serving this sentence upon the completion of the five-year sentence previously imposed for Defendant's conviction on Count 3.**

3. **For his conviction on Count 1 of the Indictment (murder of the first degree), Defendant is hereby sentenced to the custody of the Commissioner of Corrections to be imprisoned in the penitentiary for the remainder of this natural life, without the possibility of parole. This sentence shall run consecutively to the sentence imposed on Defendant for his conviction on Count 2 of the Indictment in this case so that he will begin serving this sentence upon the completion of the 1-5 year sentence previously imposed for Defendant's conviction on Count 2.**

4. **Defendant has the right to appeal his sentences, and he was advised in open Court of the proper procedure for perfecting such an appeal;**

5. **Defendant is hereby remanded to the custody of the sheriff of Greenbrier County pending his return to federal custody at Allenwood, Pennsylvania;**

6. **This order shall constitute a detainer upon Defendant so that he shall be immediately transferred to the custody of the West Virginia Commissioner of Corrections upon his release from federal custody; and**

7. **The Clerk of the Court shall forward a copy of this order to J. Michael Anderson, counsel of record for Defendant, W. Mark Burnette, prosecuting attorney of Greenbrier County, and the Records Department of Allenwood Federal Penitentiary, Post Office Box 35, White Deer, Pennsylvania 17887.**

Entered this 24th day of June 1999.

S/James O. Holliday
JAMES O. HOLLIDAY
Special Circuit Judge
Eleventh Judicial Circuit

Circuit Court Greenbrier Co., W.Va.
Filed June 24, 1999

Elizabeth Ann Banton, Clerk

A True Copy:
ATTEST:

S/ Elizabeth Ann Banton
Clerk, Circuit Court
Greenbrier County, WV

By _____
Deputy

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs. Criminal Action No. 98-F-52

GENE WILLARD GAYLOR,

Defendant.

JUDGMENT ORDER

The State of West Virginia (the "State"), by its counsel, W. Mark Burnette and R. Kevin Hanson, prosecuting attorney and assistant prosecuting attorney of Greenbrier County, respectively, and defendant GENE WILLARD GAYLOR (the "Defendant"), in person and by his appointed counsel, J. Michael Anderson and Barry L. Bruce, appeared before this Court on June 7, 8, 9 and 10, 1999 for the trial of the above-captioned case.

This matter was tried before a jury of twelve persons who were duly selected, empaneled and sworn, and that consisted of the following members: Roger D. Bevins, Jon R. McDowell, Scherry M. Bostic, Eddie Hill, Jr., Sammie D. Bare, Catherine Kessinger, Melissa S. Boggs, Joseph L. Musser, David L. Weikle, Betty L. Pinnel', Richard W. Peters, and Robert L. Cooke, III.

The jury heard all of the evidence on behalf of the State and Defendant, and it also heard the instructions of the Court and the argument of counsel for both the State and

Defendant. The jury then retired to the jury room to consider its verdict. The jury returned and rendered the following verdict in open Court:

98-F-52 "We, the jury , find the Defendant, Gene Willard Gaylor: Guilty of Murder of the First Degree. . . As charged in Count 1 of the Indictment herein.

98-F-52 "We, the Jury, find the Defendant, Gene Willard Gaylor: Guilty of Conspiracy to Commit Murder
... As charged in Count 2 of the Indictment herein.

98-F-52 "We, the Jury, find the Defendant, Gene Willard Gaylor: Guilty of Possession of Explosives with Criminal Intent ... As charged in Count 3 of the Indictment herein.

Date: 6-10-99

(Signed) Scherry M. Bostic, Foreperson

Based upon the verdict of the jury, the Court hereby ORDERS as follows:

8. Defendant is adjudged GUILTY of the offense of murder of the first degree;

9. Defendant is adjudged GUILTY of the offense of conspiracy to commit murder;

10. Defendant is adjudged GUILTY of the offense of possession of explosives with criminal intent;

11. A hearing will be conducted in this matter at 10:00 a.m. on June 24, 1999 for the purpose of deciding any post-trial motions, and for disposition if the post-trial motions are denied; and

12. The Clerk of the Court shall forward a copy of this order to j. Michael Anderson, counsel of record for Defendant, W. Mark Burnette, prosecuting attorney of Greenbrier County, and to the Records Department of the Allenwood Federal Penitentiary, Post Office Box 35, White Deer, Pennsylvania 17887.

Entered this 24th day of June 1999.

S/James O. Holliday
JAMES O. HOLLIDAY
Special Circuit Judge
Eleventh Judicial Circuit

Circuit Court of Greenbrier Co., W.Va.
Filed June 24, 1999
Elizabeth Ann Banton, Clerk

A True Copy:
ATTEST:

S/Elizabeth Ann Banton
Clerk, Circuit Court
Greenbrier County, WV

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS. **NO. 98-F-52**

GENE WILLARD GAYLOR

On this 24th day of June, 1999, came the attorneys for the state and the defendant appearing in person and by Counsel, Barry L. Bruce and J. Michael Anderson.

IT IS ADJUDGED that the defendant has been convicted (found guilty by a jury) of the offenses of murder in the first degree; conspiracy to commit murder; possession of explosives with criminal intent, as charged in the Indictment returned by a special Grand Jury held on August 27th, 1998, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Warden of West Virginia Penitentiary, his authorized representative for imprisonment in the penitentiary for the remainder of his natural life, without the possibility of parole in count 1; in the penitentiary for an indeterminate period of not less than one (1) year nor more than five (5) years in count 2; in the penitentiary for a determinate period of five (5) years in count 3. Sentence in count 1 shall run consecutively to the sentence in count 2. Sentence in count 2 shall run consecutively to the sentence in count 3. These sentences are to be served consecutively to the Federal sentence that defendant is now serving.

CONVICTION DATE: June 10, 1999.

SENTENCE DATE: June 24, 1999.

EFFECTIVE SENTENCE DATE: June 24, 1999.

IT IS ADJUDGED that the said Gene Willard Gaylor shall be given credit for zero (0) days on said sentence.

IT IS ORDERED that the Clerk forthwith transmit this record, duly certified, of the judgment and commitment to the Warden of the West Virginia Penitentiary, and that this record serve as the commitment of the defendant.

GREENBRIER COUNTY,

JAMES O. HOLLIDAY, JUDGE

S/ James O. Holliday, JUDGE

A TRUE COPY, Certified this 7 th day of July , 1999.

ELIZABETH BANTON, CLERK

S/ Elizabeth Banton, CLERK

A True Copy:
ATTEST:

S/Elizabeth Ann Banton
Clerk, Circuit Court
Greenbrier County, West Virginia

By _____
Deputy

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs. **Criminal Action No.: 98-F-52**

GENE WILLARD GAYLOR,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

On February 10-11 , 1999, the State of West Virginia (the "State"), by its counsel, W. Mark Burnette and R. Kevin Hanson, prosecuting attorney and assistant prosecuting attorney of Greenbrier County, respectively, and defendant Gene Willard Gaylor (the "Defendant"), in person and by his court-appointed counsel, J. Michael Anderson and Barry L. Bruce, appeared before the Court for a hearing on "Defendant's Motion to Dismiss Indictment."

Defendant cites two bases for his motion. First, he cites the 22½ year delay between the date on which the crime was allegedly committed, and the date on which the indictment was returned in this case. Second, he claims that the grand jury testimony in this case was "tainted" in that a certain statement of Defendant was presented to the grand jury, and Defendant asserts that the statement should not have been used against him.

Defendant has three co-defendants in this case, and the Court has granted a motion by the State to jointly hear evidence on issues that are common to all defendants. Thus, the Court heard extensive testimony and argument on the issue of pre-indictment delay, and it has determined that Defendant's motion to dismiss based upon this issue shall be denied. The Court has heard testimony concerning the issue about Defendant's statement, but it has not yet given Defendant the opportunity to argue that issue. Therefore, the Court reserves ruling on Defendant's motion to dismiss based upon the use of Defendant's statement before the grand jury.

On the issue of pre-indictment delay, the Court hereby FINDS as follows:

1. **Due to the length of the delay, a presumption of prejudice to Defendant arises pursuant to West Virginia law, but this presumption has been rebutted by the State;**

2. **The State lacked sufficient evidence to convict Defendant at any time prior to August 1998; and**

3. **The State did not intentionally delay prosecution of this case to gain a tactical advantage over Defendant.**

ACCORDINGLY, the Court hereby ORDERS as follows:

1. **Defendant's Motion to Dismiss Indictment is hereby DENIED on the issue of pre-indictment delay;**

2. **The Court will rule upon Defendant's motion to dismiss based upon the other issue at a later date;**

3. **Defendant has indicated his intent to appeal an adverse ruling by this Court on the issue of pre-indictment delay. The Court does not believe that Defendant is entitled to an interlocutory appeal. W. Va. Code § 58-5-1. The Court also does not believe that a writ of prohibition is proper or appropriate on this issue. W. Va. Code § 53-1-1 et seq., Williams v. Narick. 164 W. Va. 632,264 S.E.2d 851 (1980), and Maynard v. Bronson. 167 W. Va. 35,277 S.E.2d 718 (1981).**

Therefore, the Court will not order a stay or suspension of these proceedings pursuant to W.Va. Code § 53-1-9 or any other authority pending any attempt by Defendant to appeal this ruling; and

4. **The Clerk of this Court shall forward a copy of this order to J, Michael Anderson, counsel of record for Defendant, and to W. Mark Burnette, Prosecuting Attorney of Greenbrier County.**

Entered this 6th day of April, 1999.

S/James O. Holliday
JAMES O. HOLLIDAY
Special Circuit Judge
Eleventh Judicial Circuit

Circuit Court of Greenbrier County , W.Va.
Filed April 8, 1999
Elizabeth Ann Banton, Clerk

IN THE CIRCUIT COURT OF GREENBRIER, COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

vs.

Criminal Action No. 98-F-52

GENE WILLARD GAYLOR,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON ADDITIONAL GROUNDS

Defendant Gene Willard Gaylor (the "Defendant"), by his counsel, Barry L. Bruce, filed "Defendant's Motion to Dismiss Indictment" on or about November 13, 1998. In that motion, Defendant stated two grounds for dismissal. The first ground was an alleged denial of due process due to a twenty-two and one half year delay between the time of the alleged commission of the crime and the indictment. The second ground was that the grand jury testimony was tainted because evidence was presented to the grand jury regarding a statement given by Defendant on May 12, 1978, and Defendant asserts that he had previously been informed that that statement would not be used against him.

The state of West Virginia (the "State"), by its counsel, W. Mark Burnette, prosecuting attorney of Greenbrier County, responded to Defendant's motion to dismiss on or about February 8, 1999. In its response, the State argued that Defendant's due process rights had not

been violated due to the twenty-two and one half year delay, and it cited substantial case law in support of its argument. The State did not respond to the second ground of Defendant's motion to dismiss, but in a footnote it stated that it did not respond because Defendant did not pursue this second argument in his memorandum of law. The State indicated that it did respond to Defendant's argument regarding May 12, 1978 statement in a separate document regarding Defendant's motion to suppress evidence.

The pertinent motion to suppress evidence was filed by Defendant on November 13, 1998. In that motion, Defendant sought to exclude all evidence that he claimed was the "fruit" of the statement that he gave on May 12, 1978. The State responded to that motion on or about February 8, 1999, by arguing that the statement given by Defendant on May 12, 1978, should not be excluded from evidence in this case. The State did not specifically address whether the grand jury proceedings were tainted by use of the statement.

At a hearing conducted on or about February 10-11, 1999, the Court heard evidence regarding the first ground of Defendant's motion to dismiss-the alleged due process violation. The Court denied the motion after determining the Defendant's right to due process was not violated. The Court did not consider the second ground of Defendant's motion at this time, but counsel for Defendant raised this issue again on the last day of Defendant's trial, on or about June 10, 1999. At that time, the Court orally denied Defendant's motion to dismiss based upon the alleged presentment of the May 12, 1978 statement to the grand jury.

It is clear that pursuant to West Virginia law, a court should rarely look behind the evidence that was presented to a grand jury. In this case, the State did present evidence regarding a statement made by Defendant

to several assistant United States attorneys on May 12, 1978.However, this Court has never determined whether that statement could have been used against Defendant at trial, and the Court is of the opinion that the State did nothing improper by using the statement before the grand jury. The West Virginia Supreme Court of Appeals has consistently held that a court should not look behind an indictment to see what evidence supports it. Thus, when an indictment is returned by a grand jury, the presumption is that it was found upon sufficient and proper evidence. The indictment cannot be dismissed because it rests in whole or in part on incompetent or insufficient evidence. See e.g. State v. Woodrow, 58 W. Va. 527, 52 S.E. 545 (1905), State v. Layton, 189 W. Va. 470, 432 S.E.2d 740, (1993), State v. Bonham, 184 W. Va. 55, 401 S.E.2d 901 (1990), and Barker v. Fox, 160 W. Va. 749, 238 S.E.2d 235 (1977).

ACCORDINGLY, the Court hereby ORDERS as follows:

1. **Defendant's motion to dismiss based upon the alleged improper presentment of evidence at the grand jury is hereby DENIED for reasons stated herein;**

2. **The Clerk of this Court shall forward a copy of this order to Barry L. Bruce, counsel of record for Defendant, and to W. Mark Burnette, prosecuting attorney of Greenbrier County.**

Entered this 23 day of July 1999.

S/James O. Holliday

James O. Holliday

Special Circuit Judge

Eleventh Judicial Circuit

INDICTMENT (FELONY)

STATE OF WEST VIRGINIA,

Plaintiff,

VS. Criminal Action No. 98-F-52(J)

GENE WILLARD GAYLOR,

Defendant.

STATE OF WEST VIRGINIA,

Plaintiff,

VS. Criminal Action No. 98-F-53(J)

ROBERT VERNON BROWN,

Defendant.

STATE OF WEST VIRGINIA,

COUNTY OF GREENBRIER, TO-WIT:

COUNT 1
MURDER

The Grand Jury of the State of West Virginia, in and for Greenbrier County, West Virginia, charges that on or about February 5, 1976, in Greenbrier County, West Virginia, GENE WILLARD GAYLOR and ROBERT VERNON BROWN did

feloniously, wilfully, maliciously, deliberately and unlawfully slay, kill and murder Billy Ray Abshire. More specifically, on or about February 5, 1976, GENE WILLARD GAYLOR and ROBERT VERNON BROWN placed a bomb upon the hood of Billy Ray Abshire's car in Rupert, Greenbrier County , West Virginia. The bomb exploded upon being moved by Billy Ray Abshire, killing him. GENE WILLARD GAYLOR and ROBERT VERNON BROWN were acting as principals in the first degree and as aiders and abettors of each other. Such act of murdering Billy Ray Abshire was against the peace and dignity of the State of West Virginia and is a violation of West Virginia Code § 61-2-1.

COUNT 2
CONSPIRACY TO COMMIT MURDER

The Grand Jury of the State of West Virginia, in and for Greenbrier County, West Virginia, charges that in or about January - February 1976, in Greenbrier County, West Virginia or Allegheny County, Virginia, GENE WILLARD GAYLOR and ROBERT VERNON BROWN feloniously, unlawfully and intentionally conspired with one or more persons to commit murder, and one or more of these conspirators acted to effect the object of the conspiracy. More specifically, in or about January-February 1976, GENE WILLARD GAYLOR and ROBERT VERNON BROWN conspired with each other and with Carroll Eugene Humphries or Katherine Noff Abshire to commit the murder of Billy Ray Abshire. One or more of these conspirators acted to effect the object of the conspiracy, and these actions resulted in the murder of Billy Ray Abshire in Rupert, Greenbrier County; West Virginia on or about February 5, 1976. Such act of conspiring to murder Billy Ray Abshire was against the peace and dignity of the State of West Virginia and is a violation of West Virginia Code §61-10-31.

COUNT 3
CONSPIRACY TO INFLICT INJURY

The Grand Jury of the State of West Virginia, in and for Greenbrier County, West Virginia, charges that in or about January - February 1976, in Greenbrier County , West Virginia or Allegheny County, Virginia, GENE WILLARD GAYLOR and ROBERT VERNON BROWN feloniously, unlawfully and intentionally combined or conspired together with each other and with one or more other persons for the purpose of inflicting punishment or bodily injury upon another person. More specifically, in or about January - February 1976, GENE WILLARD GAYLOR and ROBERT VERNON BROWN

combined or conspired together with each other and with Carroll Eugene Humphries or Katherine Noff Abshire for the purpose of inflicting punishment or bodily injury upon Billy Ray Abshire. In pursuance of this combination or conspiracy, GENE WILLARD GAYLOR and ROBERT VERNON BROWN inflicted punishment or bodily injury upon Billy Ray Abshire by placing a bomb upon his car in Rupert, Greenbrier County , West Virginia, which exploded and caused the death of Billy Ray Abshire on or about February 5, 1976. Such act of conspiring to inflict injury upon Billy Ray Abshire was against the peace and dignity of the State of West Virginia and is a violation of West Virginia Code § 61-6-7.

COUNT 4
POSSESSION OF EXPLOSIVES WITH CRIMINAL INTENT

The Grand Jury of the State of West Virginia, in and for Greenbrier County, West Virginia, charges that on or about February 5,1976, in Greenbrier County, West Virginia, GENE WILLARD GAYLOR and ROBERT VERNON BROWN feloniously, unlawfully and intentionally carried or possessed a bomb, bombshell or other explosive substance with the intent to use it unlawfully against the person of another. More specifically, on or about February 5, 1976, GENE WILLARD GAYLOR and ROBERT VERNON BROWN possessed a bomb, bombshell or other explosive substance in Rupert, Greenbrier County, West Virginia, with the intent to murder Billy Ray Abshire with that bomb, bombshell or other explosive substance. Such act was against the peace and dignity of the State of West Virginia and is a violation of West Virginia Code § 61-3-7.

Found upon the testimony of Sgt. Michael E. Spradlin of the West Virginia State Police, and others, who were brought

before the Grand Jury and were duly sworn in open court to testify truthfully, this 27th day of August 1998.

S/W. Mark Burnette
W. Mark Burnette
Greenbrier County Prosecuting Attorney

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA **PLAINTIFF**

VS. **CRIMINAL ACTION NO. 98-F-52**

GENE WILLARD GAYLOR **DEFENDANT**

DEFENDANT'S MOTION TO DISMISS INDICTMENT

Pursuant to Rule 12(b) of the Rules of Criminal Procedure, the Defendant moves the court to dismiss the indictment against the Defendant, Gene Willard Gaylor, for the following reasons:

1. The delay between the alleged commission of the crime, the indictment and prosecution of this case is 22 ½ years and is presumably prejudicial and, in fact, the Defendant is prejudiced in the following areas:

a. Loss of evidence; i. e., the inability to examine physical evidence related to the alleged crime, that being the bomb, vehicle, and crime scene.

b. Loss and unavailability of key witnesses.

c. Loss of memory of various witnesses.

d. Loss of facts substantiating alibi defenses.

2. The grand jury testimony in the captioned action is tainted and was obtained from the May 12, 1978 meeting of various law enforcement

officers wherein Defendant was advised that nothing Defendant said could be used against him in a court of law as admission against him or his interest in any proceeding.

WHEREFORE, for all the aforesaid reasons, Defendant respectfully requests that the indictment against him be dismissed, and for such other and further relief as this Court deems just and fit.

GENE WILLARD GAYLOR
By Co-Counsel.

S/ Barry L. Bruce
BARRY L. BRUCE
WV Bar ID No. 511
Barry L. Bruce & Associates
P.O. Box 388
Lewisburg, WV 24901
Co-Counsel for Defendant
(304) 645-4182

CERTIFICATE OF SERVICE

I, BARRY L. BRUCE, attorney for the defendant named herein, do hereby certify that I have delivered a true copy of the foregoing Motion to Dismiss Indictment upon counsel of record, by depositing same in the United States Mail, postage prepaid, this the 13th day of November, 1998 and addressed as follows:

W. Mark Burnette, Prosecuting Attorney
Greenbrier County Courthouse
200 North Court Street
P.O. Box 911
Lewisburg, WV 24901

J. Michael Anderson (Co-Counsel for Defendant)
Attorney at Law
P. O. Box 706
Rainelle, WV 25962

S/ Barry L. Bruce
BARRY L. BRUCE

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS **CIVIL ACTION NO. 98-F-52**

GENE WILLARD GAYLOR,

DEFENDANT.

MEMORANDUM OF DEFENDANT, GENE WILLARD GAYLOR IN SUPPORT OF HIS MOTION TO QUASH THE INDICTMENT

Now comes the Defendant, Gene Willard Gaylor, and for his Memorandum in Support of Motion to Dismiss the Indictment, states as follows:

I. INTRODUCTION

Essentially, there are two avenues available to a Defendant in State proceedings for challenging excessive pre-indictment delay.

The first avenue is by challenging the delay as being in violation of the Sixth Amendment, Right to a Speedy Trial.

The second avenue is by challenging the delay as being in violation of the Due Process Clause of the Fifth Amendment. However, to challenge on the Sixth Amendment grounds, the delay must have occurred following arrest or indictment. Syl. Pt. 2, State v. Drachman, 178 W.Va. 207, 358 S.E. 2d 603 (1987).

In the instant case, Defendant, Gene Willard Gaylor is challenging the pre-indictment delay on the Fifth Amendment grounds, asserting a violation of his due process rights.

II. DISCUSSION OF PRE-INDICTMENT DELAY AND ITS IMPLICATIONS ON DEFENDANT'S DUE PROCESS RIGHTS

It is a matter of well-settled law in this State that a pre-indictment delay of approximately twenty-two (22) yeas between the alleged commission of a crime and the commencement of prosecution is presumptively prejudicial and, therefore, unless rebutted, a denial of due process under the /Constitutions of the United States and the State of West Virginia, Dickey v. Florida, 398 U.S. 30, 90 S. Ct. l564, 26 L.Ed.2d 26 (l970); State, ex rel, Leonard v. Hey, 269 S.E. 2d 394 (l980). Specifically, Syllabus Pt. 1 of the Hey decision states:

"A delay of eleven years between the commission of a crime and the arrest or indictment of a Defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the Defendant and violates his right to due process of law, United States Constitution, Amendment XIV, and West Virginia Constitution, Articles 3 and l0. The presumption is rebuttable by the Government."

Pursuant to Hey, once a Defendant has demonstrated excessive pre-indictment delay coupled with a showing that the State had knowledge of the identity and location of the Defendant, a presumption of prejudice arises shifting the burden to the state to prove either that reasonable diligence was exercised or that the Defendant has suffered no actual prejudice from the delay. The shifting of the burden to the State does not

apply in instances where the prosecution did not know the identity and location of the Defendant. Hundley v. Ashworth, 382 S.E. 2d 573 (1989). State v. Beard, 194 W.Va. 740, 461 S. E. 2d 486 (1995.)

The West Virginia Supreme Court in State v. Carrico, 189 W.Va. 40, 427 S.E. 2d 474 (1993), stated in Syllabus Point 1:

"It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right."

The West Virginia Supreme Court in State v. Foddrell II, 297 S.E. 2d 829 (1982) adopted the four factors enunciated by the United States Supreme Court in Barker v. Wingo, 407 U. S. 514, 92 S.Ct. 2182 (1972, as a means of assessing whether the state has used due diligence in seeking the Defendant. The factors to be considered are:

1. **Length of delay;**
2. **Reason for the delay;**
3. **Defendants assertion of his right;**
4. **Prejudice to the Defendant.**

If the state cannot demonstrate that it exercised reasonable diligence in its investigations and preparation for arrest, indictment and trial, then it must show that the Defendant did not suffer prejudice as a result of the delay. See Hey, *supra.* It then falls to the Defendant to show what prejudice was suffered. It has been held that the type of prejudice which must be shown is that which lessens the Defendant's ability to defend himself. Dolin v. Roberts, 317 S.E.2d 802 (1984). The United States Supreme Court has held that the death of two potential

witnesses, the unavailability of another and the loss of police records is enough for a Defendant to show actual prejudice. Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564, 26 L.Ed. 26 (1970).

In a subsequent case, the West Virginia Supreme Court held that in cases to which Hey was applicable the state's burden was to prove that the delay was not orchestrated "to gain a tactical advantage over the Defendant." Hundley v. Ashworth, 181 W.Va. 379, 382 S.E. 2d 573 (1989) cited in State ex rel State v. Hill, 491 S.E. 2d 765 (*per curium)* (1997).

However, the United States Supreme Court, in Doggett v. U.S., 505 U. S. 647 at 657, 112 S.Ct. 2686, 120 L.Ed. 2d 520 (1992), stated that if Doggett could have shown that the government intentionally delayed the proceedings in order to obtain a tactical advantage, he would not have had to show any prejudice at all. Doggett did not involve intentional delay by the government, but rather negligent delay. The Court concluded that, "Although negligence is to be weighed more lightly than a deliberate attempt to harm an accused's defense, it still falls on the wrong side of the divide ... To warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice. When the government's negligence causes a delay triggering a presumption of prejudice, albeit unspecified, and the government cannot persuasively rebut, the Defendant is entitled to relief." Doggett v. U. S., 505 U. S. 647 at 657 (1992).

The Fourth Circuit has also addressed the issue of a defendant being required to prove an improper prosecutorial motive for a delay. In Howell v. Barker, 904 F 2d 889 (4th Cir. 1990), the Court stated:

"Requiring proof of improper prosecutorial motive would mean that no matter how egregious the prejudice to a Defendant and no matter how long the pre-indictment delay, if a Defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive."

The Defendant herein contends that the greater weight of case law in West Virginia concerning pre-indictment delays is that once a defendant has shown prejudice, there is no additional requirement that he must also prove an improper prosecutorial motive before establishing that a due process violation has occurred.

III. DUE PROCESS VIOLATIONS SUFFERED BY THE DEFENDANT AS A RESULT OF THE TWENTY-TWO YEAR PRE-INDICTMENT DELAY

Here, certain matters are clear and beyond dispute. They include:

1. **This crime was alleged to have occurred some twenty-two (22) years ago.**
2. **The State has known Defendant's identity and location since the commission of the crime in 1976.**
3. **The State has known of Clayton Gaylor's statement and willingness to testify since at least September 16, 1978) (Exhibit 1).**
4. **The State had sufficient information available to indict the Defendant at least by 1978-79.**

5. **The last activity, prior to the indictment in this case, as evidenced by the discovery materials provided thus far was Trooper Kochenderfer's testimony before the Grand Jury in Richmond, Virginia, in May 1978.**
6. **Numerous witnesses essential to Defendant's case have died. These witnesses include:**
    a. **Defendant's alibi witnesses: Harry Customer from Harrisonburg VA area. Judge Foresight from Charles Town, West Virginia**
    b. **Walter "Tommy" English**
    c. **Grafton English**
    d. **C. C. Willis**
    e. **Jim Alvis**
    f. **Homer O'Dell**
    g. **Ralph Hayes**
    h. **Robert Earl Gaylor**
    i. **Erick "Uric Acid" Assid**
    j. **Clifford Roberts**
7. **Mr. Clayton Gaylor has no information that he did not have and was willing to disclose in 1976. Exhibit 2 (pages 42-43, Transcript of Mr. Gaylor's January 9, 1999, sworn statement.**
8. **Mr. Clayton Gaylor, the State's chief witness, was convicted of arson, but that conviction is now more than ten (10) years old, thus barring its use for impeachment by Defendant.**
9. **The State seeks to offer Rule 404(b) evidence, which the Defendant, due to the passage of time, death of witnesses, loss of evidence, cannot adequately rebut.**
10. **Medical records concerning Mr. Clayton Gaylor's psychiatric history and treatment**

are unavailable due to his inability to remember in which hospitals he was a patient.

11. No original reports concerning testing performed on the vehicle, bomb and/or other related materials are available.
12. Sgt. Mike Spradlin testified before the grand Jury of Greenbrier County in this matter that the reason for instituting this prosecution was that the Federal Statute of limitations has expired. Sgt. Spradlin also testified that they (the State) did not have Clayton Gaylor before. Exhibit 3.
13. Numerous records, reports, physician's evidence and other information is either lost, destroyed, or otherwise unavailable. The foregoing examples merely represent the tip of the iceberg.

The defendant has clearly suffered irreparable prejudice as a result of the excessive delay in charging him with this crime.

IV. CONCLUSION

Under Hey and its progeny, the Defendant has clearly established that this is a case where the presumption of prejudice arises due to the excessive length of the pre-indictment delay. However, as evidenced by the foregoing points, the Defendant need not rely solely on that presumption since he can affirmatively establish actual prejudice directly resulting from the pre-indictment delay.

The State clearly did not exercise due diligence in the pursuit of this case as evidenced by the fact that it has known of Defendant's identity and location for approximately twenty-two (22) years and has had enough

evidence to seek an indictment long before now. The delay by the State in pursuing this matter can only be described as egregious and clearly beyond the pale of reason.

In fact, the State's actions or perhaps more appropriately, its inaction, does rise to the level of an intentional attempt to gain a tactical advantage over the Defendant. Sgt. Mike Spradlin as much as states this in his Grand Jury testimony and the State certainly knew that by waiting its chief witness' less than stellar would be effectively purged by the rules of evidence prohibiting his impeachment. The state also surely knew that the longer it waited, the less likely it would be that the Defendant could rebut any Rule 404(b) evidence it would seek to use.

At any rate, whether the Court finds the excessive delay in this matter to be intentional or negligent, it is clearly the responsibility of the prosecution and is just as clearly an unconstitutional deprivation of Defendant's due process rights. Under Hey and its progeny, it would be repugnant to fundamental conceptions of justice and fair play to allow the state to continue this prosecution.

WHEREFORE, the Defendant, Gene Willard Gaylor, respectfully prays that this honorable Court will quash the indictment against him and order the matter to be dismissed with prejudice, and for such other and further relief as this Court deems just and fit.

DEFENDANT, GENE WILLARD GAYLOR

BY COUNSEL

Barry L. Bruce, Signature
Barry L. Bruce, State Bar ID #511
P. O. Box 388
Lewisburg WV 24901
(304) 645 4182
(Barry L. Bruce and J. Michael Anderson, Co-Counsel for Gene Willard Gaylor)

CERTIFICATE OF SERVICE

I, Barry L. Bruce of Barry L. Bruce and associates and J. Michael Anderson, Counsel for Defendant Gene Willard Gaylor, certify that I have on this date served upon the following at the addresses shown a true and correct copy of the foregoing Motion to Quash and Memorandum in Support of Motion by U. S. Mail postage prepaid, first-class on this the 25th day of January, 1999.

W. Mark Burnett, Prosecuting Attorney
200 North Court Street
P. O. Box 911
Lewisburg WV 24901

Courtesy Copy with Motions to:
James O. Holliday, Judge
Route 4, Box 250
Hurricane WV 25526

Barry L. Bruce Signature

Chief District Judge
James C. Turk
United States District Court
Western District of Virginia

Dear Mr. Turk,

I'm sending you this letter in regard to the motion for reduction and modification of my sentence that I ask you to consider.

Mr. Turk, as you know when I plea guilty in my case, I told the court that I mailed the last two letter and that I did not know what I was getting in to till it was to late, that I was in it to were I was scare for my life and I try to get out of it. When I plea guilty to the two charges my attorney told me when the court read my countes to plea nolo contendere, but I did not know what the law was so I did what he told me to do and you found me guilty on all of the charges but I don't think that I should have all four charges on me, I think I should just have two, also I have told the F.B.I. that I "did" know, Richard, last name, but I was scare for my life if I told who he was, you see even if I'm in here he will just have something done to my family and get me some other time, if I could get some protect, than I would tell ever thing that I know, but not until I can get thing sat up to were I would not be kill. The F.B.I. want information but they don't care who get hurt just as long as they can get a case close. The information that I have is very important on the Extortion case and some very, very important other crimes like, who made the bomb, who let the bomb off, who wrote the letter, who kill Abshire, who kill Stoneman, and other thing.

Everybody, think that Mr. Humphries, is not guilty of any thing but they are very wrong, he is just as

guilty as anyone is in all of this, and just maybe he more guilty than anyone is, but it look like none care if he is or not, it look like to me that the law like to get the small one and the big one go to do some more crime.

I, know that you might no understand what I'm trying to say but I think the F.B.I. don't want to get the one or two who should be got.

It hard to talk in a letter and it also hard to talk to the F.B.I. because they ask question in a very bad way not the way it should be.

I, agree with you when you said that it was a "horrible crime but I, also believe it more "horrible" to let killer to run around on the street to kill again.

If there is any way that we can work thing out than I will do my best to help to, so if you are interest in all of this or not than please let me know as soon as you can.

Thank you very much for your cooperation.

Very truly yours,

Clayton W. Gaylor

DEFENDANT'S EXHIBIT 2

42

Q. Have you been given any promises from anyone concerning -----

A. I just answered that question a while ago.

Q. I will ask one final question and I will pass this witness, unless Mike has something from our client's perspective.
So I understand, any knowledge that you had about this case, you had since 19-- - at least 1976, is that correct?
About the Abshire case, and knowledge you had concerning that case, you have had since 1976?

A. Yes.

Q. And at least since the time that you wrote to Judge Turk?

A. Yes.

Q. And the time that you asked to talk to some officials and people came in jail
- - prison to visit you?

A. Yes.

Q. You have been willing to talk about this case?

A. Yes.

MR. BRUCE: No further questions.

MR. ANDERSON: I just want to - -

BY MR. BRUCE:

Q. A follow-up question to that is:
There is nothing, no information you have heard or gained recently

that you did not have in 1996 about the Abshire case - - 1976?

A. Anything that I testify to in the Grand Jury is my own knowing. No one has influenced me or told me anything.

Q. And you have had that knowledge completely since 1976?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
MR. BRUCE: Thank you.
EXAMINATION BY MR. ANDERSON:
Q. I'm Mike Anderson, Mr. Gaylor. I represent your brother Gene along with Mr. Bruce. And I have a couple of follow-up questions. I know you didn't want to talk about any criminal activity that you may or may not have been involved in the '80's. My question is: Can you tell me how many times in the 80's you recall being arrested for anything?
A. I would rather not talk about that.
Q. Since you have been in the state of North Carolina, have you ever been arrested for anything?
A. No.

DEFENDANT'S EXHIBIT 3

the other one until just two weeks ago.
UNDISCLOSED GRAND JUROR: Why hadn't this been brought to court before?
THE WITNESS: Well, we didn't have Clayton Gaylor before, to start with. There was several jurisdictions involved: the State of North Carolina, State of Virginia, and the State of West Virginia. The federal government had jurisdiction in the bombing. They were called in to help. However, they only have a five-year statute of limitations, is my understanding. And I think, according to Morgan Scott, the U.S. Attorney who prosecuted Mr. Gaylor, everybody was cheering him on for the- - - putting Gaylor in jail for the extortion. But, you know - - I don't know - - I don't know - - I don't know. I can only speculate they felt they didn't have enough at that time. But again - - keep in mind, law enforcement in West Virginia did not know about the payment after Abshire. That never came out. Mr. Humphries never volunteered that to anybody until the bomb went off in his front yard. In fact, he didn't volunteer that until Mr. Gaylor started trying to get immunity for himself, and then all of a sudden, this story about the Las Vegas divorce came up. But that was never mentioned by Mr. Humphries whatsoever. So that was one thing. And then Clayton Gaylor wasn't beating the doors down either, telling anybody about the payment he saw at the Holiday

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Inn. That was two crucial pieces of evidence. Plus, it was a complicated case. It was - - you know, these cases are not easy.
MR. BURNETTE: Mr. (_____) ?
UNDISCLOSED GRAND JUROR: Yes. First question: The bomb that didn't go off, is there any fingerprints, anything like that on that one?
THE WITNESS: Well, they admitted - - the - - Robert Vernon Brown and Gene Gaylor both admitted putting that out there. So I don't think there was. Any they were never suspects in this thing until Gene Gaylor talked to the U. S. Attorneys in Roanoke, Virginia.
MR. BURNETTE: Which is two years later?
THE WITNESS: Which was two years later.
MR. BURNETTE: He was trying to get out of the extortion case, trying to make a deal, and that's when he became a suspect in the other bombing.
THE WITNESS: Right. He was facing some heavy-duty-time, and he was trying to test the waters to see, you know, if he could get a reduction of sentence and so forth. And it backfired, and he ended up being indicted in state court in Virginia on the bombings. There was a suppression hearing. But bottom line is, it never went to trial because these guys who are afraid of Gene Gaylor refused to testify against him.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GENE WILLARD GAYLOR,
PETITIONER,

VS CASE NO. Greenbrier Co. Criminal Action 98-F-52

JAMES HOLLIDAY, JUDGE AND MARK BURNETTE, PROSECUTING ATTORNEY FOR STATE OF WEST VIRGINIA, GREENBRIER COUNTY,
RESPONDENTS.

PETITION FOR WRIT OF PROHIBITION AND MOTION FOR RULE TO SHOW CAUSE

Now comes the Petitioner, Gene Willard Gaylor, by and through Co-Counsel, Barry L. Bruce and J. Michael Anderson, and respectfully requests this Court to grant his Petition for Writ of Prohibition on the following grounds:

1. Pursuant to West Virginia Code Section 53-1-1, *et seq*, this Court has jurisdiction to hear Petitions for Writs of Prohibition.

2. The Petitioner in this case has no other remedy at law available to him except this Petition for Writ of Prohibition. The Petitioner's right to due process under the United States Constitution has been violated under United States Constitution, Amendments 5 and 14, and under West Virginia Constitution, Article 3, Section 10.

3. This Court has previously recognized Petitioner's right to a writ of prohibition when petitioner alleges that the Circuit Court has abused its power in failing to grant Petitioner's Motion to Dismiss on the grounds of pre-trial delay. State, ex rel Leonard v. Hey, 269 S.E.2d 394 (1980), and more recently in State, ex rel. (need this information from blb)

4. The State of West Virginia concluded its investigation after West Virginia State Police Sgt. Miles Kochenderfer testified at the Federal Grand Jury hearing in Richmond, Virginia, in May, 1978, and the then Prosecuting Attorney deferred any investigation and prosecution of the case to the Federal government.

5. In May 1981 the Federal government closed its investigation as the Petitioner, Gene Gaylor, was serving a forty-year sentence in the Federal prison system.

6. There have been no further investigations by the State of West Virginia and Federal government since 1981.

7. In May 1978 after Sgt. Miles Kochenderfer returned from the Federal Grand Jury hearing in Richmond, Virginia, he knew or should have known that Agents Gantenbein and Beck met with the Petitioner in March 1978 and, without any promise of immunity, took inculpatory statements from the Petitioner. In addition, Agent Baxter in his May 31, 1978 report indicated that the Petitioner gave inculpatory statements implicating himself in the bombing death of Billy Ray Abshire. Further, in said report, Baxter outlined conversations he had with another co-defendant, Robert Brown, wherein

Brown made statements concerning Petitioner's involvement in said matter.

8. At all times the State in the motion to dismiss hearing stated they received new information from two witnesses, Clayton Gaylor, brother of Petitioner, and Carol Gaylor, ex-wife of Petitioner. Neither of them were ever interviewed by West Virginia authorities during the 22 1/2 year period and indicated no new knowledge concerning the Petitioner, and both of them were willing to talk with authorities if questioned. The identification and whereabouts of both these witnesses have been known since May 1978 and both witnesses have indicated they would have talked with authorities prior to August 1998.

9. Obviously the State of West Virginia believed on or about July 22, 1998 they had sufficient evidence to indict and try the Petitioner because the Grand Jury was summoned for said purpose on said date prior to any interviews occurring with the aforementioned two witnesses.

10. The Petitioner was indicted by the Grand Jury of Greenbrier County, West Virginia on August 27, 1998, for the following Offenses: Count 1, Murder; Count 2, Conspiracy to Commit Murder; Count 3, Conspiracy to Inflict Injury; Count 4, Possession of Explosives with Criminal Intent. See copy of Indictment (Felony) appended hereto as Exhibit A.

11. The indictment was based on allegations concerning an alleged murder of Billy Ray Abshire in Rupert, West Virginia, on February 5, 1976. The time

lapse between the time of the alleged crime until Petitioner's indictment was 22 l/2 years.

12. The Petitioner on or about November 28, 1998, filed a Motion to Dismiss the indictment because of pre-trial delay. A hearing was held on February 10-11, 1999 in the Circuit Court of Greenbrier County on said motion. The Order of the Court was entered on April 6, 1999 by James Holliday, Special Circuit Judge, denying Petitioner's Motion to Dismiss. A copy of the Order Denying Defendant's Motion to Dismiss the Indictment is appended hereto as Exhibit B.

13. The Court in its April 6, 1999 Order made three findings:

(1) Due to the length of the delay, a presumption of prejudice to Defendant arises pursuant to West Virginia law, but this presumption has been rebutted by the State;

(2) The State lacked sufficient evidence to convict Defendant at any time prior to August 1998; and

(3) The state did not intentionally delay prosecution of this case to gain a tactical advantage over Defendant.

14. As noted above, the Court decided that Defendant was prejudiced, however, the Court erred in not finding that the State had not used reasonable diligence in its investigation and preparation for arrest, indictment and trial. See Leonard v. Hey and State v. Brad. The State had at its disposal sufficient evidence to indict and try the Petitioner.

15. The State deferred its investigation and jurisdiction of this case to the Federal government; however, if they had used reasonable diligence in their investigation, as explained herein, then the Petitioner would have been tried prior to 1981.

16. There has been no investigation by the State of West Virginia since 1978. The investigation into this 22 1/2 year old murder was reopened on or about July 3, 1998 by Sgt. Michael Spradlin. An order was entered by Judge Frank Jolliffe on July 22, 1998 wherein the Grand Jury was summonsed for August 27, 1998. From July 3 to July 22, 1998, the State believed it had discovered sufficient information with which to indict the Petitioner.

17. At all times the location and identification of the Petitioner were known as he had been in the custody of the Federal prison system throughout this 22 1/2 year period.

18. The Circuit Court of Greenbrier County erred in determining that the state had rebutted the resumption of prejudice that exists from a 22 1/2 year pre-indictment delay. The Court found that this presumption was prejudiced by the fact that the Petitioner did not prove that the State's delay in bringing about the indictment was a deliberate device to gain the advantage over him. This requirement laid down by the Circuit Court is in direct violation of the Petitioner's rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution as interpreted by the United States Federal Courts. It is clear that West Virginia may not diminish the protection provided citizens by the United States Constitution. See Hey, *supra,* at 397.

19. The United States Court of Appeals, Fourth District, has decided this same issue in Howell v. Barker, 904 Fed.2d 889 (1990), wherein the State of North Carolina attempted to require the Defendant to prove a delay was brought about by deliberate device by the State to gain advantage over the Defendant. As spelled out in Howell, there is no Supreme Court case in the United States that adopts or accepts such standard.

20. The State offered no reason for its delay and failure to use reasonable diligence in its investigation!

21. The Court was clearly wrong and abused its discretion and power in not allowing the Petitioner to produce evidence showing how the Petitioner was actually prejudiced by the loss of evidence; i. e., the inability to examine physical evidence related to the alleged crime that being the bomb, vehicle and crime scene; loss and unavailability of key witnesses because of death, unavailability of government reports, actual bombing materials that had been destroyed, hotel and motel records that had been destroyed because of the extreme time lapse; loss of facts substantiating alibi defenses, including the deaths of two alibi witnesses; and loss of memory of witnesses. The Court did not allow Petitioner to show how he was prejudiced and because of its erroneous ruling the State gained advantage over the Petitioner by its deliberate device.

22. The Court was clearly wrong in determining that there was not sufficient evidence to indict and try the Petitioner. If the Court follows the correct balancing test, it must examine the reason for the delay and here there is no reason for the delay. The Court in Hey has determined that it must use reasonable diligence in their

investigation which the State has admitted they did not do.

23. The State is estopped from deferring their investigation of this matter to the Federal government for 22 l/2 years, and is estopped from doing so under due process clauses of the Constitutions of the United States and the State of West Virginia, along with West Virginia Rules of Criminal Procedure, Rule 48 (b).

24. Once the Court believed the State had rebutted the presumption of prejudice, the Petitioner had a right to present evidence of the actual prejudice. The Court failed to follow appropriate procedure and case law in not allowing Petitioner to present said evidence.

The case, State of West Virginia vs Gene Willard Gaylor, Criminal Action No. 98-F-52 is scheduled for trial in the Circuit Court of Greenbrier County, Judge James Holliday presiding, on June 7, 1999.
WHEREFORE, Petitioner respectfully requests this Court grant a rule to show cause to delay said trial until such time as this Court can set a hearing on Petitioner's Writ of Prohibition.

PETITIONER
BY COUNSEL

s/ Barry L. Bruce
Barry L. Bruce, State Bar ID #511
P. O. Box 388
Lewisburg WV 24901
(Barry L. Bruce and J. Michael Anderson, Co-Counsel for Gene Willard Gaylor, Petitioner)

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

VS

CIVIL ACTION NO. 98-F-52 (H)

GENE WILLARD GAYLOR,
Defendant

MOTION FOR A NEW TRIAL PURSUANT TO RULE 33, RULES OF CRIMINAL PROCEDURE AND MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29, RULES OF CRIMINAL PROCEDURE

Now comes the Defendant, Gene Willard Gaylor, by Co-Counsel, Barry L. Bruce and J. Michael Anderson, and for his Motion for a New Trial and Motion for Judgment of Acquittal states as follows:

The Defendant, Gene Willard Gaylor, moves this court for a new trial and judgment of acquittal in that the evidence adduced at the trial was insufficient to convict the Defendant. The Court should disregard the testimony of Clayton Gaylor as he admitted in his testimony that he would lie if it was beneficial to himself. Clayton Gaylor had a motive to falsify his testimony for the reason that he would not be charged of further crimes in the States of Virginia and West Virginia. Therefore, the Court should discount the testimony of Clayton Gaylor as without his testimony there was insufficient evidence to convict the Defendant.

The motion for a new trial is based on the following factors:

1. The Court would not allow the Defendant to introduce testimony about a 1988 habitual offender DUI felony against Clayton Gaylor in the State of Virginia; thus, the State gained a tactical advantage over the Defendant by bringing this prosecution ten years after said felony conviction.

Clayton Gaylor was the State's key witness and without the ability to impeach said witness with the aforesaid felony conviction, the Defendant was greatly prejudiced.

The Court erred in not allowing the Defendant to cross examine Clayton Gaylor regarding the outstanding felony warrant in existence in the State of Virginia to show that the witness had a motive and bias to prevent his further prosecution in the State of Virginia.

2. The Court erred in not allowing defense Counsel to cross examine Clayton Gaylor with prior inconsistent statements without first showing Clayton Gaylor's statement. Rule 613 of Rules of Evidence provides that a Defendant does not have to show the statement to the witness prior to questioning him. The Defendant had statements given by the witness in 1978 to the Federal Bureau of Investigation that contained references to other 401(b) matters that the court had previously ruled admissible and, thus, could not show the Defendant the statements for fear of opening the door to inadmissible evidence.

Therefore, Defendant was prejudiced by said Court ruling in not being able to impeach the witness with his prior inconsistent statements to the F.B.I. and to the State Farm Insurance Company adjuster.

3. The Defendant attempted on numerous occasions to obtain a copy of the driver's license of Clayton Gaylor to show that he obtained the license illegally, fraudulently or with the aid of the State of West Virginia. The Court would not allow the Defendant to examine Clayton Gaylor on said matter this impeding Defendant's ability to cross examine and show bias and prejudice on the part of Clayton Gaylor.

The Court erred in not allowing the Defendant to cross examine Clayton Gaylor regarding obtaining his driver's license illegally, fraudulently or with aid of the State.

WHEREFORE, for all the aforesaid reasons, Defendant respectfully requests that this Court grant him a new trial and/or judgment of acquittal, and for such other and further relief as this Court deems just and fit.

DEFENDANT
BY CO-COUNSEL

S/Barry L. Bruce
Barry L. Bruce, State Bar ID #511
J. Michael Anderson, State Bar ID #
(Co-Counsel for Defendant
Gene Willard Gaylor)

CERTIFICATE OF SERVICE

I, Barry L. Bruce, Co-Counsel with J. Michael Anderson, for Defendant, Gene Gaylor, certify that I have on this date served upon the Mark Burnette, Prosecuting Attorney of Greenbrier County for the State of West Virginia, a true and correct copy of the foregoing Motion for a New Trial and Motion for Judgment of Acquittal by U.S. Mail, first-class, postage prepaid, to him at the Greenbrier County Courthouse, Lewisburg, West Virginia, on this the 18th day of June, 1999.

Barry L. Bruce
Barry L. Bruce

Chief District Judge
James C. Turk
United States District Court
Western District of Virginia

Dear Mr. Turk,

I'm sending you this letter in regard to the motion for reduction and modification of my sentence that I ask you to consider.

Mr. Turk, as you know when I plea guilty in my case, I told the court that I mailed the last two letter and that I did not know what I was getting in to till it was to late, that I was in it to were I was scare for my life and I try to get out of it. When I plea guilty to the two charges my attorney told me when the court read my countes to plea nolo contendere, but I did not know what the law was so I did what he told me to do and you found me guilty on all of the charges but I don't think that I should have all four charges on me, I think I should just have two, also I have told the F.B.I. that I "did" know, Richard, last name, but I was scare for my life if I told who he was, you see even if I'm in here he will just have something done to my family and get me some other time, if I could get some protect, than I would tell ever thing that I know, but not until I can get thing sat up to were I would not be kill. The F.B.I. want information but they don't care who get hurt just as long as they can get a case close. The information that I have is very important on the Extortion case and some very, very important other crimes like, who made the bomb, who let the bomb off, who wrote the letter, who kill Abshire, who kill Stoneman, and other thing.

Everybody, think that Mr. Humphries, is not guilty of any thing but they are very wrong, he is just as guilty as

anyone is in all of this, and just maybe he more guilty than anyone is, but it look like none care if he is or not, it look like to me that the law like to get the small one and the big one go to do some more crime.

I, know that you might no understand what I'm trying to say but I think the F.B.I. don't want to get the one or two who should be got.

It hard to talk in a letter and it also hard to talk to the F.B.I. because they ask question in a very bad way not the way it should be.

I, agree with you when you said that it was a "horrible crime but I, also believe it more "horrible" to let killer to run around on the street to kill again.

If there is any way that we can work thing out than I will do my best to help to, so if you are interest in all of this or not than please let me know as soon as you can.

Thank you very much for your cooperation.

Very truly yours,

Clayton W. Gaylor

(Report of ATF Agent Beck)

Department of Treasury•Bureau of Alcohol, Tobacco and Firearms

REPORT OF INVESTIGATION (Criminal Enforcement)

Page 1 of 4

TO: Special Agent in Charge, Cincinnati District
FROM: Andrew J. Beck, Jr., Spl. Agt, Bluefield, W.Va.
TITLE OF INVESTIGATION: Rupert Bombing
UNIQUE IDENTIFIER: 2801 0276 0014 E
TYPE OF REPORT: Final and Supplemental

DETAILS:

This report relates to the investigation of a bombing and the facts established during this period, from February 5, 1976, to this date.

Victim: Billy Ray Abshire, DOB 01-29-39, white, male, address - Box 454, Rupert, West Virginia, telephone No. 392-5846. No known criminal history.

Date of Crime: Thursday, February 5, 1976, at approximately 7:20 A.M. EST.

Place of Crime: Greenbrier County, Western District, residential area, in the driveway of victim's residence located on the north side of Pocahontas Street in the city limits of Rupert, West Virginia.

Discovered by: Patrolman Clarence Bennett, Rupert Police Department, Box 4, Rupert, West Virginia, telephone No. 392-6389, at approximately 7:25 A.M., Thursday, February 5, 1976.

Weather Conditions: Temperature approximately 35 degrees, cloudy, ground wet with some snow on ground at the scene of the crime.

Synopsis of Violation: Sometime during the night of February 4 or early morning hours of February 5, someone placed a cardboard box, approximately the size of a hat box, on the hood of the victim's car. The box housed a homemade bomb, which detonated at 7:20 A.M. when moved by the victim. The victim was killed instantly, the body being hurled about 20 feet.

Primary Conductors of Investigation: West Virginia State Troopers Miles Kochenderfer and F. R. Lavender and the ATF Agents Andrew J. Beck and Walter Wysocki.

Progress of Investigation: Starting on February 5, and continuing for several days the investigation was directed toward the securing and examination of all physical evidence and the establishment of a list of names of all subject who had a possible motive for killing Abshire. A thorough search was made of the bomb scene and all remains of device examined and labeled. This was later sent

Submitted by: s/Andrew J. Beck, Special Agent, 8/9/76
Reviewed by: s/Walter A. Wysocki, RAC 8/9/76
REPORT OF INVESTIGATION - CONTINUATION SHEET

Page ___ of ____

DETAILS (continued)

to the ATF Forensic Laboratory in Washington. Continuing investigation produced the following possible suspects:

1. Mrs. Katherine Abshire, Rupert, West Virginia, wife of victim. Motive - pend[ing] divorce action by Bill Abshire which would cancel the life insurance listing as beneficiary and possible court action to take her three young children. Katherine stood to gain $24,000.00 in insurance upon Bill's death, plus having the house paid off. Further motive was the fact she was having an affair with Carrol C. Humphries and desired to marry him.

2. Carrol C. Humphries: Covington, Virginia, employed as a State Farm Insurance Agent. Motive - was having an affair with victim's wife, resulting in danger[__] exposure which might damage his reputation or even result in reprisal from Abshire in the form of physical assault or court action.

3. David Smith: Rainelle, West Virginia, employed as principal of Rupert Elementary School. Motive - had torrid affair with Kitty Abshire in past. There was the danger of exposure which would cost him his job.

4. Curt C. Willis: Rupert, West Virginia, next door neighbor of Kitty Abshire and supervisor of Bill Abshire at place of employment, Appalachian Power Company. Motive - had had brief affair with Kitty and stood to lose his wife and reputation if discovered.

5. John Grossl - Rupert, West Virginia. Motive - had had brief affair with Kitty however, motive not as strong as others, did not have much to lose.

6. Frank Barker: City Officer, Charleston, West Virginia Police Department. Mot[ive] reported to be father of Kitty's oldest child. Motive weak however, as affair would have occurred about 8 years ago when Barker was single.

7. Harold "Boogie" Shawver: Former police officer in Dunbar, West Virginia, now living in Chattanooga, Tennessee. Motive - two years ago Bill Abshire dated a girl in Dunbar and caused her to break off with Shawver, whom she had been dating. Shawver was very angry over this.

8. Bill Abshire, victim: Motive - was separated from wife, Kitty, and in the progress of getting a divorce. Death of possible intended victim, Kitty, would have assured retention of children. Also, the intended victim could have been Humphries, who was dating Kitty, or maybe both. Investigation continued to attempt to gather evidence if this was an accidental bombing, in order to assu[re] proper conclusion.

Active investigation continued for about two months. During this time, we were assisted in trying to gather all possible information by many different people and departments, including ATF Regulatory, ATF agents in Virginia, North Carolina and Wyoming, Sheriff's Offices in West Virginia and Virginia. E.O.D. experts and several people recognized as the foremost bomb experts in the country were contacted.

During this time, all suspects were cleared to our satisfaction with the exception of Abshire and Shawver, either by a Polygraph Examination or other means.

REPORT OF INVESTIGATION - CONTINUATION SHEET
DETAILS (Continued) **Page ___ of ____**

interrogation of Shawver was delayed as it was agreed that if there was any hard evidence against, him, it should be obtained before questioning.

Every possible effort was made to try to determine the exact construction of the [bomb] including the peculiar presence of two small plastic bottles in the seat of the [ ] explosion. At this point, after about two months of active investigation, the ty[] investigation changed, primarily to paperwork; correspondence with different lab and paper and plastic companies. The best available advice was obtained from many different sources, from people who are experts in their own fields. Not only were labs utilized, but those of the State of West Virginia and labs of private industry.

Response from the paper and plastic industries was gratifying; almost all replied the inquiries, although almost 100 were contacted, in an effort to trace the logos found on the bottles and cardboard box housing the bomb. The attempt to identify plastic bottles and the type of box used was pursued with such intentness because was felt that if they could be identified, we might be able to establish who purch[ased] or had access to such articles.

The Institute of Paper Chemistry at Appleton, Wisconsin was contacted and asked to examine a small portion of the box used to house the bomb. They replied with a detailed report and were able to determine the exact composition of the paper fibe[r] and how it was constructed. All information received from them, as well as information received from other sources, was utilized in an effort to determine the origi[nal] use of the box. The end results being; it appears the box was of foreign

manufacture most likely Japan, and quite likely a small children's "night or travel case"; possibly a toy case.

The plastic bottles, which were in the box with the explosive, were traced to the Monsanto Commercial Products Company of St. Louis, Missouri. They advised they had ceased to use the logo, which was on the bottles, about 7 years ago. However, they had one machine that was still used to make this particular bott[illegible]. They sold all these bottles to a consumer in Chicago. This customer was contacted, and there [the] trail ended as he shipped out many thousands of these empty bottles all over the world. There is no way to determine what they contained.

It is felt that these bottles may have contained shaving lotion, as there was also present in the box a complete Gillette razor. This was the old type where the hand[le] is twisted to open the head for the blade. The reason for their presence in the bo[ ] box is not known.

In July of 1976, Harold "Boogie" Shawver, the last remaining suspect, was contacted in Chattanooga, Tennessee. We were convinced beyond any doubt that he was not responsible for the bombing and had no knowledge of it. At this point, all suspect had been eliminated, with the exception of Abshire, the victim.

<u>Conclusion</u>: After exhausting all possible leads, and sorting all evidence and facts, the only logical conclusion is that Billy Abshire killed himself accidentally. He had a very strong motive; he had the knowledge and skill to construct a destructive device; he had the opportunity; he had access to the necessary components; and he had a peculiar personality which made him capable of such a crime. It was established

REPORT OF INVESTIGATION - CONTINUATION SHEET

DETAILS (Continued)

that Abshire used an old type razor for shaving, the same type and brand that was [ ] in the box of explosives. At his place of employment he had access to Hercules blasting caps and Kinepak explosives. (Our Forensic Lab in Washington identified components removed from Abshire's body as being from a Hercules cap. They also believed the explosive was Kinepak.) Also, in a shed used by Abshire as a small workshop, we located a Hercules electric blasting cap on the floor. With the absence of any ty[pe] of timing device, the trigger had to be a pressure release or an anti-movement dev[ice]. Evidently, Abshire in the construction, failed to include a safety arming device; last fatal mistake.

Note: It is suggested that in the future, ATF investigations may be aided in gath[ ] information by the use of laboratories and facilities of private industry, depending on the type of information needed. The Institute of Paper Chemistry, P. O. Box 10[ ], Appleton, Wisconsin 54911, Phone 414 734-9251, is capable of analyzing different t[ypes] of paper and cardboard and determining the construction and assist in identification. The man to be contacted is William C. Krueger. Also, in attempting to identify cardboard, the logical place to start is by contacting the National Paper Box Manufacturers Association, 231 Kings Highway East, Haddonfield, New Jersey 08033.

In the field of identifying plastic containers, it is suggested that initial inquiry be made to Mr. John Malloy, c/o The Society of Plastic Industry, Inc., at 355 Lexington Avenue,

New York, New York 10017. He is the Staff Director for the SPI and might be of great service.

(Report of Agent Baxter)
REPORT OF INVESTIGATION (Criminal Enforcement)

Page 1 of 7

TO: Special Agent in Charge, Richmond Virginia
TITLE OF INVESTIGATION: Bombing - Mechanicsville, Virginia
UNIQUE IDENTIFIER: 4710-0777-4006 X 01
TYPE OF REPORT: Status
BUREAU PROGRAM: Explosives
PROJECTS: General

DETAILS:

During this last reporting period the following has been learned:

On May 5, 1978, in U. S. District Court, Harrisonburg, Virginia, Gene Gaylor was convicted of four counts of extortion (victim - Carroll Eugene Humphries) and sentenced to serve twenty years in the federal penitentiary. Gaylor noted an appeal, however, this was denied and he is presently incarcerated in the Roanoke City Jail pending his transfer to a federal institution.

On Thursday, May 11, 1978, the writer was notified by AUSA George Metcalf that he had been contacted by AUSA Morgan Scott, Roanoke, Virginia, and advised that Gaylor wished to meet with the Assistant U.S. Attorneys involved with the bombing cases in Rupert, West Virginia; Kernersville, North Carolina and Richmond, Virginia and make a statement concerning these and other violations. Gaylor's conditions was that no ATF Agents or other law enforcement officials be present at the meeting. His conditions were agreed to and the meeting was set for May 12, 1978, in Roanoke, Virginia.

On May 13, 1978, the writer was contacted by AUSA Metcalf and advised that they had met with Gaylor and again he presented unreasonable demands, early release from custody; $100,000; total immunity; relocation and protection for his family. Requests were denied and Gaylor agreed then to talk off the record about various crimes he was involved in. No promises were made regarding immunity, however, he was advised that anything he said could not be used against him in a court of law or as an admission against his interest in any federal proceedings.

Gaylor attempted to lay the entire blame on the various bombings in West Virginia and North Carolina on John Stoneman, saying that Stoneman had arranged for the killings, furnished the explosive devices, etc. Gaylor further stated that he and Robert Vernon Brown, Kernersville, North Carolina had placed the explosive devices and that it was later necessary to kill Stoneman as Stoneman had stated that he was going to kill Gaylor as a result of a drug deal in which Stoneman lost a large amount of money. Gaylor said that he and a Richard Byers did this

Submitted by: s/George V. Baxter, Special Agent, Richmond Virginia, 5/31/78
(names of persons reviewing and approving were not legible but were dated 6/5/78 and 6/6/78 respectively)

REPORT OF INVESTIGATION - CONTINUATION SHEET

DETAILS:

killing, however, he could furnish no further information as to the whereabouts of Richard Byers, other than that he believed him to reside in Richmond, Virginia. Gaylor stated that he usually contacted Byers by telephone, but that he had lost his number and at the present time did not know how to contact him.

Gaylor further stated that in or around the first of February, 1975, he was contacted by a friend, Harry Cobb, Verona, Virginia, who stated that he had a friend that wanted a job done. Gaylor stated that he later met with a Jack Armstrong in Verona and that Armstrong wanted a competitor's business shut down. Armstrong owned and operated the Wagon Wheel Restaurant and desired additional business, therefore, he hired Gaylor to close his competitor, Billy Dees. Gaylor further stated that he was paid $2,000 and on February 3, 1975, Billy Dees was completely destroyed by an explosive device. This was investigated under UI #4711-1175-5004 M. According to Gaylor, he and Robert Vernon Brown participated in the bombing and further Gaylor described the explosive device utilized. His description was accurate. The writer participated in the bomb scene investigation at Billy Dees and the device consisted of two packages of 2x16 dynamite placed in two different spots in the restaurant, it was denoted by Gaylor that the size was correct. The device was detonated by means of an electric timer, plugged into the wall socket.

Gaylor also said that he was later contacted by Harry Cobb who, through Jack Armstrong, offered Gaylor $10,000 on a package deal to destroy two additional restaurants, Good Time Charlie's and Dice's Inn. Gaylor

again stated that he and Robert Vernon Brown placed the explosive devices and described the devices used accurately. The device at Good Time Charlie's was a pipe bomb filled with black powder, detonated by means of a clock and batteries and placed on top of the air conditioner at the front of the business. Again the writer participated in the bomb scene investigation and his description of the device was accurate. This matter was investigated under UI #4711-1175-5006 U.

The device at Dice's Inn was placed down a drain pipe on the roof of the business, failed to detonate and was rendered safe by EOD Personnel. Evidence was retained by Sheriff John Kent, Augusta County Sheriff's Department, and according to investigative reports, Gaylor was again accurate on his description of the device. This matter was investigated under UI # 4711-1175-5005 R.

Gaylor stated that as only one device detonated in the package deal, that Cobb or Armstrong went back on their deal and only paid him $5,000 for the job. According to Gaylor, Armstrong then became scared and stated that he wanted the other bombing on Dice's Inn called off.

Gaylor further admitted to approximately five arsons in the Richmond, Virginia area involving residences owned by John Stoneman. Apparently these were done on a contract basis by Gaylor and Stoneman collected insurance on the various fires. Gaylor gave a correct description of the various locations and the means used to torch the residences.

REPORT OF INVESTIGATION - CONTINUATION SHEET

DETAILS:

Gaylor further states that he participated in the larceny of John Stoneman's boat and Brickland Sports Car in order that insurance money could be collected by Stoneman.

Gaylor, although not on tape at this time, admitted that he and Robert Vernon Brown killed Stoneman in Hanover County, Virginia; Billy Ray Abshire in Rupert, West Virginia and Patsy Roberson in Kernersville, North Carolina.

Pertaining to the Roberson killing in Kernersville, North Carolina, November 20, 1975, Gaylor said that he was hired to kill Bennie Robertson by Bennie's wife, Dolly. Gaylor further said that Brown assisted him in this but that Brown didn't want Dolly to be aware that he was helping. The device contained in what appeared to be an eight track tape box was left at Roberson's residence, however, the device was opened by Patsy Tuttle Roberson who was killed as a result of the explosion.

Concerning the killing of Billy Ray Abshire in Rupert, West Virginia, on February 5, 1976, Gaylor stated that he was hired by Carroll Eugene Humphries to kill Abshire. Abshire's wife, Kitty was dating Humphries and further she held a life insurance policy on her husband, Billy Ray. Gaylor stated that this was a package deal in that he was to be paid $10,000 to kill Abshire and later burn Humphries' house in order that he (Humphries) could collect insurance from the fire.

Gaylor stated that he and Brown obtained the bomb from John Stoneman but that Brown actually placed the device on the hood of Abshire's vehicle. Apparently

Abshire was killed when he attempted to remove the package from his car. Gaylor further states that he and his brother, Clayton Gaylor, later burned down Humphries' house while he was on his honeymoon, having married Abshire's wife, Kitty. Humphries apparently held out money on Gaylor, thus, the attempted extortion of Humphries for which Gaylor is now serving twenty years.

Concerning the killing of John Stoneman, Gaylor stated that he and Brown also did this and that they stayed at the Virginia Inn in Richmond, Virginia, the night prior to Stoneman's death. This has been verified and a Jack Brown was registered at that location during that period. Gaylor further described the device perfectly including how it was detonated and placement of the device. This explosive device detonated the morning of July 22, 1977.

Enclosed with this report is a copy of the transcript of Gaylor's conversation with the Assistants on May 12, 1978, in Roanoke, Virginia.

As a result of the aforementioned, a Federal Investigative Grand Jury was convened in Richmond, Virginia, during the week of May 22 through 26, 1978. Present were the following authorities representing various jurisdictions:

Special Agent George Baxter, BATF, Richmond, Virginia

Special Agent Irvin Moran, BATF, Richmond, Virginia

Investigator Jim Tillett, Virginia State Police, Richmond, Virginia

REPORT OF INVESTIGATION - CONTINUATION SHEET

DETAILS:

Special Agent Aubrey Huffman, BATF, Winston-Salem, North Carolina

Special Agent L. C. Puryear, BATF, Winston Salem, North Carolina

Special Agent Tom Sturgill, State Bureau of Investigation, Greensboro, N.C.

Special Agent H. B. Hartley, State Bureau of Investigation, Greensboro, N.C.

Lt. Robert Cook, Kernersville Police Department, Kernersville N.C.

Special Agent Jerry Gantenbein, BATF, Bluefield, West Virginia

Special Agent Andrew J. Beck, BATF, Bluefield, West Virginia

Trooper Miles Kochenderfer, West Virginia State Police, Bluefield, West Virginia

Subpoenaed were various suspects and individuals from the three localities involved with the deaths of Stoneman, Abshire and Roberson. Names will not be furnished at this time as some were not actually compelled to testify, but gave needed information in interviews conducted prior to the appearance. Transcripts will be obtained as soon as completed by court reporters.

Many individuals perjured themselves and others took the fifth, refusing to answer any questions. Harry Cobb apparently lied, stated that he had never furnished explosives to anyone and denied that he introduced Gaylor to Jack Armstrong. Jack Armstrong took the fifth and refused to answer any questions.

Robert Vernon Brown answered in the negative when asked if he accompanied Gene Gaylor on the bombing deaths and took the fifth on remaining questions involving insurance fraud, the theft of the boat, car, arsons, etc. etc.

Dolly Roberson, present wife of Robert Vernon Brown, perjured herself by stating under oath that she didn't know Gene Gaylor and then later during the same day gave a statement to North Carolina Authorities, that she did.

Other information concerning the Grand Jury, and charges arising from same will be reported when the complete transcripts are received.

Robert Vernon Brown was questioned extensively, prior to his appearance before the Grand Jury and denied any knowledge of the charges acknowledged by Gene Gaylor. He refused to take a polygraph examination, and during a break stated that he contacted his attorney in Kernersville, North Carolina who stated that he was not to make any statement or talk further with us. Information was left with Brown in the event that he wished to change his mind.

On Monday May 29, 1978, I received a telephone call from Robert Vernon Brown stating that he wished to talk and requested that I meet him in Kernersville, North Carolina as soon as possible.

The following day, May 30, 1978, I went to Kernersville, North Carolina, where I joined with Brown, he requested that we go to the Scorpio Restaurant in Winston Salem, North Carolina. He inquired if I was wired and stated that he would not make any statement on tape but that he wished to talk about the entire matter.

REPORT OF INVESTIGATION - CONTINUATION SHEET

DETAILS:

Brown constantly denied that he accompanied Gaylor on any bombing where someone was killed, however, he did state that he accompanied him on the bombing of Good Time Charlies and the attempted bombing of Dice's Inn. In fact, Brown stated that he placed the bombs on each occasion, however, he did so at the direction of Gaylor and that Gaylor supplied the devices on both. Brown further stated that they were accompanied by a subject known to him as Gene English, a white male, approximately 60 years old, short, heavyset.

Brown further stated that he and English were each paid $250 for their part in the bombings. According to Brown, they were met by Gaylor who stated that he had a job to do. They went on a dirt road in the western part of Virginia, where Gaylor explained to them how the bombs were designed to function, and that all they had to do was set them in place. Gaylor set the timing device on both prior to their placement. Brown described both devices accurately and the correct placement of each. He stated that he would testify against Gaylor in court if some arrangements could be worked out concerning his part in the violations.

Brown further states that he knows that Gaylor killed Roberson, Abshire and Stoneman through statements made to him by Gaylor after the events. According to Brown, he casually mentioned to Gaylor that he (Brown) was having trouble with Bennie Roberson and that Roberson had threatened him several times. Shortly thereafter, the device detonated at Robersons, but instead of killing Bennie, got Patsy. Gaylor later came to Brown and attempted to pressure him into moving some stolen

property. Brown stated that he didn't want to take it at that present time, and Gaylor stated "you better take it, we're all in this together". Brown asked him what he meant and Gaylor replied "I'm the one that delivered the gift at Bennies". Later Gaylor also told Brown something to the effect that he (Gaylor) was still aware that Bennie had a problem and that he would take care of it first chance that he got, apparently referring to the fact that Bennie was still alive.

Brown stated that Gaylor told him that he (Gaylor) was hired by Humphries to kill Billy Ray Abshire, but that Humphries hedged on the payment, therefore the attempted extortion. Gaylor also said that he was going to take care of Humphries at his first opportunity.

Brown could supply little information as to Stoneman, but was aware that some individual in Hopewell, Virginia, had skipped out with some money that had been paid by Gaylor and two other individuals for drugs. It is believed that this subject is possibly Jack Williams, the step son of Robert Gaylor, Gene's other brother. Williams has not been seen or heard from since July 8, 1977. It appears as if this might be the motive behind Stoneman's death. He paid Gaylor money for drugs, Williams skipped, and according to information received, Stoneman gave someone a choice by July 22, 1977, either the money or the drugs. Stoneman was killed the morning of July 22, 1977, leading to the conclusion that he was expecting his shipment.

REPORT OF INVESTIGATION - CONTINUATION SHEET

DETAILS:

Brown further admitted to taking the boat and sports car. Further he was directed to store both at his brothers in Julian, North Carolina until picked up by Gaylor. Brown was driven to the Holiday Inn, Ashland, Virginia, where he picked up the car. The keys were left in the ignition and it was stored as directed. Brown states that he did not see the car after leaving it in Julian, North Carolina.

Brown said that Gaylor told him to pick up the boat at the Holiday Inn in Raleigh, North Carolina and instructed it to be taken to Julian. The boat was parked at the correct location and Brown did as he was instructed. He stated that he did not see it from that time.

Brown further admitted to various crimes with Gaylor and Gene English including:

1. The passing of forged checks drawn on the Echols Brothers Construction Co., Staunton, Virginia. Checks were passed in Virginia and North Carolina and according to Brown were not stolen during the alleged breaking and entering but were taken by Harry Cobb, and employee at Echols Brothers.

2. Check fraud, whereby a dummy corporation was set up, a bank account opened with a minimal amount in the name of the corporation and checks printed. A check writer was obtained and checks passed in the states of Georgia, Tennessee, South Carolina, North Carolina and

Virginia. A new corporation would then be established and they would start over.

3. An armed robbery with Gaylor and English of an elderly subject in one of the western counties of Virginia. Brown was armed with a sawed off shotgun and English with a handgun. They gained entry by using law enforcement credentials furnished by Gaylor. Taken was about $600 in cash, a ring and a firearm, Brown stated that he still has access to the firearm and will turn it over to authorities and testify.

4. Counterfeit money purchased by he and Gaylor from subject Haley in Roanoke, Virginia. Brown states that he still has approximately $1,000 of the money buried and will surrender it to authorities.

5. Numerous insurance frauds, where Gaylor would allege that his vehicle was stolen, collect insurance money and then crush the vehicle in the junk that year in Kernersville, North Carolina. Several frauds whereby Brown and Gaylor would have a phony accident and then both collect from various insurance agencies.

Brown further furnished the writer with correspondence received from Gaylor since his incarceration detailing plans on how Brown was to break him out of jail in Roanoke, Virginia. Plans ranged from the supplying of hack saw blades to take over the U.S. Marshals who transport Gaylor to and from Federal Court. A detailed sketch was furnished on the Poff Federal Building and underground parking in Roanoke, Virginia.

REPORT OF INVESTIGATION - CONTINUATION SHEET

DETAILS:

This information was immediately brought to the attention of AUSA Morgan Scott Roanoke, Virginia, who states that he would alert the U.S. Marshall in order that security could be increased. Scott stated that he would have this done in a manner that would not be apparent to Gaylor.

It is believed that Brown did accompany Gaylor during the bombings of Roberson, Abshire and Stoneman, but as of this time, he continues to deny his involvement.

It is anticipated that a meeting should be held with Brown, AUSA Scott and other officials having jurisdiction to determine partial or total immunity in order that Browns testimony can be utilized against Gaylor and others.

It is requested that this investigation remain in a pending status.

Attachments: Copy of conversation between Gaylor and AUSAs, May 12, 1978

Copies of letters sent from Gene Gaylor to Robert Vernon Brown.

STATE OF WEST VIRGINIA
DEPARTMENT OF PUBLIC SAFETY
REPORT OF INVESTIGATION

Detachment File Number: E-2219	Headquarters File Number: 71911
Date of Report: March 12, 1976	Station: Rainelle, West Virginia County: Greenbrier
Initial Report	Report Made by: Trooper M. C. Kochenderfer, Unit 150
Status of Investigation:	Pending
Subject of Investigation:	Murder Violation of Chapter 61, Article 2, Section 1 of the Code of West Virginia
VICTIM:	BILLY RAY ABSHIRE, DOB: 01-29-39, Male, White, Box 454, Rupert, West Virginia, telephone: 392-5846. No known criminal history.
DATE OF CRIME:	Crime occurred on Thursday, February 5, 1976, at approximately 7:20 A.M. EST.
PLACE OF CRIME:	Greenbrier County, Western District, residential area, in the drive-way of the victim's residence located on the north side of Pocahontas Street in the city limits of Rupert, West Virginia.
DISCOVERED BY:	Crime was discovered by Patrolman Clarence Bennett, Rupert Police Department, Box

	4, Rupert, West Virginia, 392-6389, at approximately 7:25 A.M. EST, Thursday, February 5, 1976.
WEATHER CONDITIONS:	Daytime, temperature approximately 35 degrees, ground was wet with some cloudy, snow still on the ground at the scene of the crime.
ACCUSED:	None.
SUSPECTS:	None.
MOTIVE:	Unknown.
MODE OF OPERATION:	Unknown subject or subjects placed a cardboard container, similar to a hat box on the hood of the victim's car. It is believed that the box housed a home-made bomb. The exact contents is unknown, however it has been established that the detonating system was electric. When the victim either moved or opened the container, the parcel exploded causing death.
PROPERTY STOLEN:	None.
PROPERTY RECOVERED:	None.
LIST OF EXHIBITS:	(1) One U. S. Postal Receipt # 216393 dated February 10, 1976 to certify that physical evidence was mailed to Forensic Lab, Washington, D.C.

LIST OF EXHIBITS: (2) One analysis result from Willard D. Washington, Forensic Chemist, U. S. Treasury Department Lab, Washington, D.C. that commercial dynamite was not used in the explosive, however further tests will be conducted.

(3) One letter dated February 18, 1976 from Vernon McCloud telling of results of fingerprint examination conducted thus far.

(4) Records of long distance telephone calls from the residence of the victim and his wife, received from the West Virginia Telephone Company, Clay, West Virginia.

(5) Report from State Medical Examiners office containing record of post mortem examination signed by Ivan Sopher, Chief Medical Examiner, Charleston, West Virginia, case number 76-6.

(6) One diagram of the explosion area drawn by Trooper F. R. Lavender on February 5, 1976.

(7) One divorce summons naming the victim as the plaintiff and Katherine Nolf Abshire as the defendant. Civil action number 7584, filed with the Circuit Clerk of Greenbrier County on February 4, 1976, named in the divorce is C. E. Humphries.

(8) 10 - 8 x 10 photographs of the victim after death, taken at the State Medical Examiners office.

(9) One receipt dated February 11, 1976, signed by Marshall Abshire, brother of the victim for some of the victims personal belongings.

(10) 15 - 3 x 5 colored pictures of the victim taken by the undersigned at Wallace & Wallace Funeral Home on February 5, 1976.

(11) All other physical evidence has been submitted by registered mail to the Treasury Departments Forensic Lab in Washington, D.C.

(12) Two pages of type written notes of interviews conducted by ATF Agent Wysocki and Agent Jerry Neal from Lana Abshire and Joan Boggess in the Charleston, West Virginia area.
(13) One receipt signed by the wife of the victim for quantity of keys which were with his possessions.
(14) 10 colored photographs of the victim received from Criminal Identification Bureau.
(15) Letter dated March 4, 1976 to the U.S. Treasury Department Lab, Washington, D.C., attention: Mr. Washington, submitting additional evidence.
(16) Analysis report dated March 1, 1976 from U. S. Treasury Lab, stating that commercial dynamite nor any commonly used explosive was used in the bombing device.
(17) Certified U.S. Mail receipt 216427 dated March 5, 1976, showing that additional evidence was mailed to the Forensic Lab in Washington, D.C.

ACTION TAKEN: On Thursday, February 5, 1976, at approximately 7:20 A.M. EST, the undersigned heard a large explosion in the Rupert area. The undersigned went to investigate and found the Rupert Fire Department and Patrolman Clarence Bennett, Rupert Police Department at the scene. The undersigned also observed the body of a male subject lying some distance from a demolished auto. After a quick inquiry at the scene, it was learned that what was believed to have been a bomb exploded.

The area was cleared by the undersigned and Patrolman Bennett. A quantity of rope was secured from the Rupert Oil Company which was used to cord off the immediate area.

A request for assistance was made through State Police Beckley for Corporal R. J. Adams, Summersville Detachment to come to the area and attempt to determine if any other explosive devices had been set in the immediate vicinity. A request was then made for Trooper M. A. Morriston, Summersville Detachment, and Trooper D. L. Belcher, Gauley Bridge Detachment, to come to the scene and conduct a crime scene search. While in the immediate area, the undersigned talked with James Quillen, an employee of Rupert Oil, who had observed a large box sitting on the hood of the victims automobile, described by Mr. Quillen as being hat box size, at approximately 7:10 A.M. that morning. The body was removed to Wallace & Wallace Funeral Home where it was photographed by Trooper Lavender and the undersigned. While at Wallace & Wallace the undersigned officer contacted Mr. Edgar Smith, Prosecuting Attorney, Greenbrier County, requesting

that the body be sent to the State Medical Examiners office in Charleston, West Virginia for a complete autopsy and X-rays to recover any metal fragments or foreign objects imbedded in the body. A request was also made through Company D Headquarters that a chemist and photographer be present during the autopsy to recover evidence and take pictures.

At approximately 1:00 P.M., the undersigned accompanied by Corporal A. R. Bruce and Deputy H. B. May visited the residence of the victim's wife. At this time, the victim's wife, Katherine was advised orally of her Constitutional Rights by the undersigned. Mrs. Abshire stated that she would talk to the officers and proceeded by relating domestic problems between she and the victim of which the undersigned officer had prior knowledge through friendship with the deceased. At this time, Mrs. Abshire advised that she had been having an affair with a man whom she identified as C. E. Humphries of Covington, Virginia who is a State Farm Insurance Agent in that area and that she had been friends with Mr. Humphries since early summer, 1975.

ACTION TAKEN: After a brief conversation with Mrs. Abshire, it was suggested that she submit to a polygraph examination to which she readily agreed. Later that evening, Mrs. Abshire notified the undersigned by telephone that she had changed her mind and would not take the polygraph examination.

The undersigned officer then left the Abshire residence and returned to the area of the blast. Upon completion of the search of the general area, the undersigned officer returned to the Rainelle office where he met with the three brothers of the victim, Joe, Marshall and John Michael Abshire.

On the morning of February 6, 1976, a request was made by telephone for assistance from the A.T.F. office in Bluefield, West Virginia. The undersigned accompanied by Trooper F. R. Lavender, Deputy Sheriff H. B. May and Patrolman Clarence Bennett went back to the crime scene and conducted a further search for physical evidence.

On the afternoon of February 6, 1976, A.T.F. Agents Wysocki and Beck arrived to assist in the investigation. These Agents were taken to the scene of the crime, showed where the victims wife lived and were taken to the garage where the vehicle had been stored. Later, upon returning to the Rainelle officer, a friend of the victim, Randy Pendleton, Rainelle, West Virginia, was requested to come to the Rainelle State Police office for an interview. Pendleton related knowledge of the marital and financial problems that the victim may have been having at this time.

On February 7, 1976, Saturday, the undersigned and Deputy H.B. May contacted Homer O'Dell, an area representative of the Prudential Insurance Company.

Mr. O'Dell advised that the victim had a life insurance policy which would pay $24,430 to his widow. An oral request was made to Mr. O'Dell to delay payment to the widow until the completion of this investigation. Mr. O'Dell stated that he would honor this request as far as he could.

On Sunday, February 8, 1976, the undersigned received a telephone call from Katherine Abshire stating that she would like to have all information pertaining to her husband's death and that she would like to have her house searched for possible explosives that may have been planted there by her dead husband. Again the undersigned officer advised her that she was still a suspect in this case and that no information pertaining to her husbands death could be released to her. The undersigned also informed her that she could conduct a better search of her area than anyone else as she would know any strange objects in the area. She was advised that if she found any strange objects she could call the undersigned and he would come to the area to search.

ACTION TAKEN: On Monday, February 9, 1976, the undersigned officer drove to the Criminal Identification Bureau in South Charleston, to obtain physical evidence removed from the victim's body and to have film developed that had been taken at the crime scene.

While at the South Charleston office, the undersigned was contacted by Agent Wysocki who stated that Mrs. Abshire had called him at Bluefield stating that she believed a bomb had been placed in her garage and would officers come to the scene to investigate.

The undersigned then called the Summersville Detachment office to request assistance from Corporal Adams. It was learned that he was in the Lewisburg area at a doctors office. A teletype message was then forwarded to State Police Lewisburg requesting that Corporal Adams be at the Rainelle office at 2:00 P.M. to assist in the search of the Katherine Abshire residence, with negative results.

On February 10, 1976, the physical evidence was prepared and mailed to the A.T.F. Forensic Lab in Washington, D.C. The undersigned officer received a telephone call from a Mr. Jim Pribe at 744-4601, South Charleston, West Virginia, who is Security and Safety Officer for American Motors Company, South Charleston. Mr. Pribe advised that a sister-in-law of the victim, Lana Abshire, wished to speak to an officer reference the death of the victim.

On February 12, 1976, a request was made to West Virginia Telephone Company, Rupert, West Virginia, for toll slips for both the victim and his wife. At this time, it was learned from the telephone company that a

court order or subpoena would have to be issued before the telephone company could release this information. On February 13, 1976, a request was made through the Greenbrier County Prosecuting Attorney's office for a court order for the telephone company records of the Abshire residence.

On February 17, 1976, the undersigned accompanied by Officer Bennett, Rupert Police Department, contacted John Leo Grossl whose name had been associated with Katherine Abshire. Grossl advised that he would be at the Rainelle office between 5:00 and 5:30 P.M. the following day to submit to a polygraph examination.

ACTION TAKEN: On February 20, 1976, Sergeant W. H. Mitchell, Polygraph Operator A.T.F. Agents Beck and Wysocki and the undersigned officer met at the Rainelle office to determine which people would be contacted and asked to take the polygraph examination.

Trooper F. R. Lavender and Sergeant Mitchell drove to the Katherine Abshire residence and talked with Mrs. Abshire who stated that she would contact her Attorney then come to the Rainelle office to be questioned.

The undersigned and Agent Wysocki drove to the Rupert Elementary School and talked with Mrs. Preston Zopp for approximately one hour at which time she was offered the opportunity to take the polygraph examination. She stated that she wished to speak to her husband before making any commitments.

The undersigned officer and Agent Wysocki drove to Crichton School where Preston Zopp is principal. Upon interviewing Zopp for thirty minutes, he was accorded the opportunity to take a polygraph examination, however, stated that he would like to consult with an attorney and his wife prior to any commitments.

At approximately 12:30, Mrs. Abshire arrived at the Rainelle office and spent several hours talking with Agents Wysocki, Beck and Sergeant Parsons and Sergeant Mitchell. Preston Zopp also came to the Rainelle office and stated that he and his wife would submit to a polygraph examination later in the afternoon. At approximately 7:00 P.M., the Zopps returns to the Rainelle office and were interviewed for approximately one hour by Sergeant Mitchell. At this time, Sergeant Mitchell did not think that the Zopps had any knowledge of the victim's death.

John Grossl and his wife also came to the Rainelle office and were interviewed, however not given a polygraph examination and are cleared of any involvement in this crime.

On February 22, 1976, the investigating officer called Katherine Abshire and she stated that she would talk to Sergeant Mitchell if he would come to her residence in Rupert, West Virginia.

A request was made that evening for Sergeant Mitchell to return to the Rainelle area on Monday, February 23, 1976 which he did.

On February 23, 1976 at approximately 10:00 A.M., Sergeant Mitchell and Corporal A. R. Bruce went to the residence of Mrs. Abshire at which time she readily submitted to a polygraph examination, with negative results which cleared her as a suspect in this crime.

ACTION TAKEN: During the interview with Mrs. Abshire, it was learned that her oldest son had said that he had seen his father and a Mr. C. C. Willis building a bomb. Mr. Willis was called to the Rainelle State Police office where he readily submitted himself to a polygraph examination which cleared him of any knowledge of the statements made by the ten year old child.

On February 25, 1976, at approximately 1:15 A.M., the undersigned officer received a public service call at his residence from a male subject who identified himself as Mike Abshire, a brother of the victim. The undersigned talked to Abshire approximately fifteen minutes. During the conversation, Abshire stated that he was on his way to Rupert to extract a confession from Mrs. Abshire and then to kill her. After talking with this subject for some time, he assured the undersigned that he would not interfere in any way with the investigation and would stay at his residence in the Nitro area.

Upon arriving at the Rainelle office that morning, the undersigned officer called and talked to Mrs. Joe Abshire, Dunbar, West Virginia, who stated that she would contact her husband and other members of the family in an attempt to talk to Mike and to have him refrain from any further interference in this investigation.

The following day, Agents Wysocki and Beck returned to Mrs. Abshire's residence to speak with her again reference the death of her husband and to search the victims personal den for any evidence that the victim may have constructed the bomb himself. Upon receiving permission, the search was conducted with negative results.

Permission was then acquired from C. C. Willis for a search of his gun shop which the victim visited regularly for any evidence of explosive materials. The search was conducted with negative results.

On February 26, 1976, the undersigned met with Agents Wysocki and Beck at the Lewisburg office. At this time permission was requested from the District Sergeant to accompany the federal agents to the Covington, Virginia area to interview the suspect C. E. Humphries. Mr. Humphries was interviewed for approximately three hours however, he was very elusive and incomplete with his answers. Mr. Humphries did state he would consider a polygraph examination but did not think he would submit to the examination.

On March 4, 1976, Mr. Humphries was contacted by telephone and asked why he had not attempted to contact the West Virginia officers reference polygraph examination and he stated that his Attorney had asked him not to take the examination and not to talk to the West Virginia officers.

ACTION TAKEN: The undersigned officer then went to the garage where the victim's vehicle is being stored and ran a vacuum cleaner over the exterior in an attempt to secure more physical evidence.

On March 5, 1976, Agent Wysocki and Trooper M.C. Kochenderfer contacted and talked to Mr. James Alvis of Rupert in reference to the property he owns which was rented by Abshire where he was living at the time of his death.

Agent Wysocki also went to the Covington, Virginia area the afternoon of March 5 and contacted a Mr. Carson, Attorney for Mr. C. E. Humphries, who advised that he would attempt to have Mr. Humphries come to the Rainelle office on Monday, March 8, 1976 for a polygraph examination.

On the day of the explosion, February 5, 1976, the undersigned officer was contacted by Sergeant Meador, Beckley, West Virginia, advising that Mr. Clifford W. Roberts who had previously been employed by the Federal Government, had contacted him volunteering his services and prior knowledge of explosives and their results.

On March 6, 1976, the undersigned contacted Mr. Roberts who readily volunteered to come to the Rainelle area and give what assistance and advice he might be able to give. Upon his arrival in Rainelle, he first viewed the automobile, later was taken to the scene of the explosion where he stated that he did not feel the explosion was of a high intensity that would have been of a commercial manufacturer, but one of a low intensity that would have been home constructed.

Mr. Roberts then briefed the investigating officers as to the many possibilities of detonating a home constructed explosive device. Upon his departure from the Rainelle

area, he advised that he would return on Monday or Tuesday of the following week in an attempt to locate the type of detonating device used at the scene of the explosion.

On Sunday, March 7, 1976, the undersigned officer again contacted Mr. Homer O'Dell of Prudential Insurance Company and advised him that Mrs. Abshire was no longer a suspect in this case and that the delay in payment of a life insurance policy of the victim could be withdrawn.

On March 8, 1976, Agents Wysocki and Beck arrived at the Rainelle office and promptly proceeded to the Rupert Elementary School where they talked with Mr. David Smith, Principal. Mr. Smith was invited to the Rainelle State Police office to be interviewed by TFC DeQuasie, Polygraph Operator, and possibly be administered a polygraph examination. Mr. Smith arrived at the Rainelle office at 1:00 P.M. and subjected himself to the polygraph examination with what was believed to be positive results. However on March 11, 1976, Mr. Smith again came to the Rainelle office where he

ACTION TAKEN: was again administered a polygraph by TFC DeQausie and Sergeant Mitchell with negative results of all questions asked; this clearing him of any knowledge of the crime covered in this report.

On March 8, 1976, Mr. C. E. Humphries of Covington, Virginia, who is a male associate of the victim's wife, came to the Rainelle office and readily submitted himself to the polygraph examination and produced negative results, as to knowing anything about or having anything to do with this crime.

At this time, the investigating officers have no further leads to pursue, however, the case is still being investigated and upon the addition of more evidence a supplemental report will be submitted.

WITNESSES: MR. EDGAR SMITH, Prosecuting Attorney, Greenbrier County, 645-1230, can testify that he gave the undersigned officer permission to transport the victims body to Charleston for pathology work.

MR. IVAN SOPHER, Chief, State Medical Examiner, 348-3689, Charleston, West Virginia, can testify that he did perform an autopsy on the victim and that he did recover foreign objects from the body of the victim.

DR. WALLACE WOLFE, Greenbrier County Coroner, Lewisburg, West Virginia, 645-2150, can testify that he did view the body of the victim at Wallace & Wallace Funeral Home, Rainelle on February 5, 1976.

JOHN ELMORE, Mortician, Wallace & Wallace Funeral Home, Rainelle, West Virginia, 438-8523, can testify to the removal of the victims body from the crime scene and to

the recovery of portions of the victims body that had been scattered by the explosives.

MILTON MCKINNEY, Wallace & Wallace Funeral Home, Rainelle, West Virginia, 438-8523, can testify to the removal of the victims body from the crime-scene and to the recovery of portions of the victims body that had been scattered by the explosives.

HOMER ODELL, Prudential Insurance Agent, Clintonville, West Virginia, 392-5381, can testify that he was contacted by the investigating officer and was requested to delay life insurance payments to the widow until she was cleared of any involvement in her husband's death.

RICHARD BOWERMASTER, West Virginia Telephone Company, Clay, West Virginia, 587-4211, can testify that he did receive a subpoena for a record of long distance telephone calls made by the victim and the victim's wife.

CLIFFORD ROBERTS, 101 Charles Street, Beckley, West Virginia, 255-1107, can testify that he did view the victim's auto and crime scene and advised the investigating officers of his opinion in reference to the type of explosives and detonating device.

WITNESSES: MR. WILLARD WASHINGTON, Chief, U.S. Treasury Department Forensic Lab, Washington, D.C., can testify that he did receive the evidence in Washington, D.C. and to conducting certain examinations on this evidence.

MR. VERNON D. MCCLOUD, Fingerprint Examiner, Forensic Lab, U.S. Treasury Department, Washington, D.C. can testify to examining the evidence for fingerprints and to the results of this examination.

MR. JAMES QUILLEN, Smoot, West Virginia, 392-5775, employee of Rupert Oil, Rupert, West Virginia, can testify that he did drive by the victim's residence at approximately 7:10 A.M., February 5, 1976 and noted a hat box size container sitting on the hood of the victims car.

CLARENCE BENNETT, Patrolman, Rupert Police Department, 392-6389, can testify that he was the first person to arrive on the scene after the blast and to assisting in the investigation of this crime covered in this report.

STEVE HARRIS, Chief, Rupert Police Department, 438-8242, can testify to assisting in the control of curious onlookers at the explosion scene, the morning of the blast.

BERNARD ODELL, Patrolman, Rupert Police Department, 392-5682, can testify that he did assist in the control of curious onlookers at the explosion scene, the morning of the blast.

DEPUTY H. B. MAY, Greenbrier County Sheriff's Office, 392-6320, can testify to the fact that he did assist in the securing of physical evidence at the scene and to assisting in the investigation of the crime covered in this report.

TROOPER L. P. MULLENS, State Police, Rainelle, West Virginia, 438-8911, can testify to assisting other officers in securing the crime scene and to the search for physical evidence.

TROOPER M. A. MORRISTON, State Police, Summersville, West Virginia, 872-2151, can testify to being summonsed to the Rainelle area on March 5, 1976 and to assisting in the securing of physical evidence.

TROOPER D. L. BELCHER, State Police, Gauley Bridge, West Virginia, 779-2631, can testify to being summonsed to the Rainelle area on March 5, 1976 and to assisting in the securing of physical evidence.

CORPORAL R. J. ADAMS, State Police, Summersville, West Virginia, 872-2161, can testify that on two different occasions he was called to the Rupert area to secure an area from possible planted explosive charges.

WITNESSES: CORPORAL A. R. BRUCE, State Police, Rainelle, West Virginia, 438-8911, can testify to assisting Sergeant in polygraph examinations conducted during the process of this investigation.

SERGEANT W. H. MITCHELL, Polygraph Operator, State Police, South Charleston, West Virginia, 348-2357, can testify to conducting the polygraph examinations of Mrs. Katherine Abshire, Mr. C.C. Willis, and to assisting TFC J. A. DeQuasie in the polygraph examination of David Smith and C. E. Humphries.

TFC J.A. DEQUASIE, Polygraph Operator, State Police, South Charleston, West Virginia, 348-2357, can testify to conducting the polygraph examinations to Mr. C. E. Humphries, Covington and David Smith, Rainelle, West Virginia.

TROOPER F.R. LAVENDER, State Police, Rainelle, West Virginia, 438-8911, can testify to supervising the crime scene search and to assisting the undersigned in various matters of this report.

TROOPER C. K. THOMPSON. Chemist, Criminal Identification Bureau, South Charleston, West Virginia, 348-2357, can testify to being present during the autopsy and to assisting Doctor Sopher in retrieving physical evidence from the body and relaying same to the undersigned officer.

AGENT WALTER WYSOCKI, U. S. Treasury Department, Special Agent, Bluefield, West Virginia, 372-9312, can testify to interviewing various people in and around the Charleston area accompanied by Agent Jerry Neal of the

Charleston office. Agent Wysocki can further testify to facts covered in this report.

AGENT JERRY NEAL, U.S. Treasury Department, Charleston, West Virginia, can testify in assisting Agent Wysocki in interviewing friends and associates in the Charleston area pertaining to this case.

AGENT JACK BECK, U.S. Treasury Department, Special Agent, Bluefield, West Virginia, 327-9312, can testify to all fact covered in this report that were conducted in the Rupert, Rainelle and Covington, Virginia areas.

TROOPER M. C. KOCHENDERFER, State Police, Rainelle, West Virginia, 438-8911, can testify to all facts covered in this report.

MILES TRAVELED AND
MAN HOURS SPENT: 2,000 miles 576 hours

/s/ Miles C. Kochenderfer
Trooper, Co. "D", Unit 652

COPY TO: The Superintendent
Prosecuting Attorney
Detachment File

(State Farm Insurance Report)

PRIVATE & CONFIDENTIAL
August 28, 1979

MEMORANDUM TO:	**C.A. Pettit, Audit Consultant**
FROM:	**W.F. Gibney, Regional Audit Consultant**
RE:	**Carrol Eugene Humphries, #2360 Covington, VA File #1-205**
REFERENCE:	**Special Activity Report of Regional Audit Consultant Gibney, dated December 12, 1978**

On August 2, 1979 Regional Audit Consultant Gordon Sutherland and I interviewed Clayton Wayne Gaylor, an inmate at the Federal Correctional Institution at Danbury, Connecticut. Mr. Gaylor was sentenced to fifteen years in a federal prison on May 23, 1978 for mailing threatening communications to Agent Humphries. Both Clayton Gaylor and his brother Gene W. Gaylor (who was convicted on the same charges and is currently serving a twenty year sentence in a federal prison) have indicated that they have performed "jobs" for Humphries. The "jobs", according to trial testimony, were the murder of the present Mrs. Humphries' former husband, Billy Abshire and the fire at Humphries' residence in June 1976.

Clayton Gaylor's stated position at the beginning of the interview was that although he had performed various illegal acts for Humphries, he did not want to furnish any information that would get him additional time in prison. He agreed to talk in generalities but said he would deny and admissions he might make in discussing specific crimes.

Gaylor said that the attempted extortion charge on which he was convicted was the only felony charge that had ever been brought against him. He said he had been arrested in the past for minor charges such as drunk and disorderly conduct, and described his past criminal activities as that of a minor participant. Clayton Gaylor said his brother Gene Gaylor, together with John Stoneman (killed in a dynamite explosion outside his home in Richmond, Virginia during July 1977) and Bob (Vernon) Brown of Winston-Salem, North Carolina were the leaders and arrangers on arsons and break-ins that were performed for Humphries. Clayton Gaylor said he was satisfied to receive a few hundred dollars for his part in the criminal activity which consisted of setting a house on fire, stealing a car or engaging in a house break-in. He said he would take red pills or liquor to get his courage up for a job then spend his share of the proceeds after the act on getting drunk.

PRIVATE & CONFIDENTIAL

Carrol Eugene Humphries
File #1-205
August 28, 1979

Clayton Gaylor was asked for details within his knowledge of any fraudulent claims in which Humphries participated. He spoke in generalities about faked accidents involving his brother, Gene Gaylor, Bob (Vernon) Brown and John Stoneman but said he did not know any of the details. He said that he thought Humphries had insured his brother Gene's car with Travelers Insurance Co. and had also insured Gene Gaylor's house in Covington, Virginia (where his wife presently lives) with Travelers through their office in Stanton, Virginia. He recalled that Gene Gaylor had submitted a false theft claim to Travelers alleging the loss of guns, TV, stereo, radio, C.B. and walkie, talkie.

Without identifying any of the property owners, either because he wouldn't or did not know their identify, Clayton Gaylor said that between 1974 and early 1978 he participated in the following criminal activities upon instructions received indirectly through his brother Gene Gaylor from Agent Humphries:

Location	Activity
Hot Springs, Virginia	1 Store Break-in
Covington, Virginia	1 Fire 2 Break-ins
Clifton Forge, Virginia	1 Car Stolen (At a Football Game)

Allegheny County — **1 Fire**
1 Break-in

In the instances of the fires, the establishments were allegedly burned to the ground. Clayton Gaylor said he received $200.00 for each fire, $100.00 for each break-in, and $50.00 for stealing the car.

Discussion Relating to Billy Abshire's Death in February 1976

Gaylor inferred that Humphries had arranged for Abshire's death and had agreed to pay $8,000.00 for the "job". He said he was uncertain of dates but thought that in October and/or November 1975 Humphries made two $2,000.00 cash down payments; that he subsequently bought $2,000.00 worth of drugs from the Gaylors,

leaving $6,000.00 due for payment within six months. Gaylor said that when Humphries did not make the $6,000.00 payment on time that loan charges of $4,000.00 were added. He said that this figure of $10,000.00 was the basis for the $10,000.00 demanded in the threatening letters sent by the Gaylors to Humphries.

Gaylor said that at one stage of their effort to get $10,000.00 (after several telephone calls and letters were sent to Humphries) Humphries had offered to pay $1,000.00.

Discussion Relating to Fire at Humphries Home in June 1976

Clayton Gaylor stated that his brother, Gene Gaylor and Bob (Vernon) Brown had made arrangements with Humphries to burn Humphries' house so that Humphries could collect insurance monies. It was his understanding that Humphries paid Gene Gaylor $1,200.00 for the "job" and that Bob (Vernon) Brown received $200.00. Gaylor said he received $100.00. He stated that he had spread gasoline throughout the house, lit the match to ignite it, and watched from a distance (the house is in a rural area of Virginia) as the Dunlap, Virginia Fire Department arrived at the fire scene. Gaylor said that the fire was set about 12:30 or 1:00 a.m. and estimated the period as about the fall of 1975 (records identify the fire occurring in June 1976) while Humphries was on his honeymoon with Billy

Abshire's former wife.

Further Action Planned

1. Clayton Gaylor was asked to give further thought to our discussion and the need for specifics was stressed. He has agreed to consider furnishing further information and arrangements for a later meeting were left open.

2. Gene Gaylor, Clayton Gaylor's brother, who is presently serving a twenty year term at the Federal Penitentiary at Atlanta, Georgia was described to be more knowledgeable in arrangements of past fraudulent activities allegedly engaged in with Agent Humphries. If desired, contact will be made with Gene Gaylor to ascertain if he is receptive to being interviewed.

WFG/rld

(Motions Hearing Transcripts)

Direct - Baxter

Q Now, Mr. Baxter, at some point during your career, you became involved in an investigation with – that investigated Gene Willard Gaylor; is that correct?

A That's correct, sir.

Q When did you first become involved in this investigation?

A I believe it was during July of 1977 when a local contractor in Hanover County was killed by an explosive device. His name was John Pervis Stoneman.

Q Okay. And did the name Gene Willard Gaylor first come to your attention during that investigation?

A Yes, sir. During the course of this investigation, I talked with other investigators in North Carolina and West Virginia, and during the course of my conversation with them pertaining to the explosive device, the name Gene Willard Gaylor came up.

Q How long did your investigation involving Gene Willard Gaylor last?

A It lasted until such time as he was incarcerated in the Western District of Virginia for extortion.

Q And do you know what year that was?

A I believe it was 1988.

Q Was there ever an attempt –

MR. DETCH: Your Honor, I believe he said 1988. I think

(Grand Jury Transcripts)

Q Where were you stationed in 1976?

A In Cincinnati. But in 1977 I transferred to Bluefield, West Virginia.

Q Okay. Where do you live now?

A We have a cottage in northern Michigan.

Q Okay. Did you investigate the death of Billy Ray Abshire?

A Yes.

Q Could you tell the grand jury briefly how you got started in that investigation?

A Well, the case was an ongoing investigation, when I was transferred to Bluefield from Cincinnati. And in the course of my employment there, we received a phone call from a Gene Gaylor, requesting a meeting. And we did have a meeting.

Q Was this after Gaylor was arrested for extortion charges, do you know?

A I am not sure if it was before or after.

Q Okay. Do you remember the meeting with Mr. Gaylor?

A Yes, I do.

Q How many times did you meet with him?

A Once.

Q And where was that meeting?

A That was at the Holiday Inn in Covington, Virginia.

Q Do you remember about when that meeting was?

A I believe it was in March.

Q Of 1978?

A Of 1978, correct.

Q Okay. Who was present at the meeting besides you and Mr. Gaylor?

A There was another agent there, who is also retired, named Jack Beck.

Q ATF agent?

A Yes.

Q Anyone else present?

A No, only Mr. Gaylor.

Q Do you recall any member of the Abshire family being there?

A Yes, they were there, but they were not at the meeting. They were in the restaurant at another table.

Q That would have been Billy Ray Abshire's brothers; is that correct?

A That's correct.

Q Can you tell the grand jury what you remember about this meeting with Mr. Gaylor?

A Yes. Mr. Gaylor came into the restaurant and came over to our table and sat down. He asked for our identification, which we showed him, and I asked for his, which he showed me. And he wanted to know if he was being recorded, and I told him no. And the purpose of the meeting, as far as he was concerned, was to try to get federal immunity in the Abshire case, that is to say, immunity from prosecution.

Q And he was on bail, he – okay. You don't know that he had been arrested for extortion, right?

A I am sorry. I can't specifically remember that.

Q Okay. He wanted to tell you about certain crimes, but he wanted immunity for them; is that correct?

A That's correct.

Q And I assume you told him that you couldn't give him immunity for a state crime; is that correct?

A That's true.

Q Did he tell you – Even though you couldn't give him immunity, did he tell you anything about the crimes?

A Well, he said that he had specific knowledge of it and could help clear it up. And in the process of doing this, he hauled out a folder with a lot of newspaper clippings, and that type of thing, that related to the bombing, and showed them to me.

And I said, "Well, anybody can get newspaper clippings. Do you know anything more specific?" And at that point he told me that he had specific knowledge of going over there that night, and putting a bomb on the car of Billy Ray Abshire. And when I asked him about the bomb, he flipped over the place mat in front of him and drew me a sketch of the bomb. The sketch was good enough that I recognized it as being appropriate to the type of device that was used to kill Billy Ray Abshire. And then he again requested immunity.

Q And you have some training in building bombs, I suppose?

A Yes, I have.

Q Part of your job duties with the ATF was to investigate bombings?

A Yes.

Q So that when you say that the sketch he made looked close to what killed Billy Ray Abshire, the ATF had a theory of what kind of bomb killed him; is that right?

A Yes, it was a device that was designed to explode when you picked it up.

Q Okay. And the sketch he showed you, did he give you specifics about how that bomb was to be detonated?

A Yes, he did. Inside the box, without getting technical, there was a piece of wood, like an arrow, like a part of an arrow. And it came down on a slant to a hole in the bottom of the box, so that when you picked the box up, the piece of wood would slide down through the hole and set the device off.

Q Is it fair to say that he basically confessed to

you, building this bomb?

A Well, his specific words to me that nobody could – "No one could ever prove that I was anything but a middleman." That's a quote.

Q Did he say who was with him at the bombing of Billy Ray Abshire?

A He said that he drove over from Virginia to West Virginia, showed them the house, his car, and assisted these other unnamed gentlemen, unnamed at that time, and where to put the bomb, how to do it, when to do it, all of that kind of stuff.

Q Okay. Do you recall anything else significant about that meeting?

A Nothing really comes to mind.

Q What went through your mind when he is drawing you the sketch of the bomb and telling you that he has these details about the Billy Ray Abshire bombing? What were you thinking at the time?

A Oh, in my mind, he was knowledgeable enough at that – just in that conversation that he must have had specific knowledge of the death.

Q Okay. Did he talk about the bombings of anyone else during that meeting?

A Did I talk to him?

Q Yes. Did Gaylor talk about the bombings of anything else during that meeting?

A No.

Q Just the Billy Ray Abshire –

A Just the Billy Ray Abshire case, yes.

Q After that meeting, did you ever meet with Gene Gaylor again?

A No, I did not.

Q Did you do any further investigation on the case?

A Yes, I did. I coordinated with the U.S. Attorney's Office and the West Virginia State Police and communicated to them the results of the meeting that we had, and determined that the United States Attorney in Charleston was not interested in providing immunity for this man. We felt we could do better than that.

Q Did you meet with Mr. Carroll Humphries at any time?

A Yes, I did.

Q What brought about that meeting? Why did you meet with him?

A Well, in the course of our investigation, we had been to Mr. Humphries' house and talked to him about the investigation and asked him questions, and I guess the expression is, "put a little heat on them," and then we left. Sometime later, I can't remember the date, he called our office.

A No, sir, I was not.

Q And when I refer to the investigation in West Virginia, I am referring to the investigation of the death of Billy Ray Abshire.

A That's correct, yes, sir.

Q How did it come to your attention that any of these matters were related?

A Well, I originally was interested in the method of ignition on the explosive devices. And during the course of this, several names surfaced as being connected with the victims in the various localities. And that was Gene Gaylor.

Q Did you ever discuss the prosecution of Gene Willard Gaylor, Robert Vernon Brown, Katherine Abshire, or Carroll Humphries with Mr. Kochenderfer?

A Yes, sir. Any information I obtained in my locality that pertained to West Virginia, I referred to Mr. Kochenderfer.

Q Do you know why Gene Willard Gaylor was not prosecuted in West Virginia in 1976?

A I don't believe they had sufficient evidence to prosecute him.

Q Do you know why he was not prosecuted in 1978?

A Sufficient evidence didn't exist.

MR. DETCH: Your Honor, we object.

obtained." And you had indicated here that your testimony was that you had hoped that additional witnesses would step forward?

A That's correct, sir.

Q Why did you think that any additional witnesses would step forward?

A Well, I was aware that many different people were afraid of Mr. Gaylor, afraid of what might happen if he was released. And I was hoping that upon learning of his release, they might come forward and supply additional evidence.

Q Did you do anything to make that easier for these witnesses to know of that?

A Well, I – if I am not mistaken, it was along about that time that I passed on information to the various localities that this might be a good time to recontact witnesses, such as Mr. Humphries, Ms. Abshire, and down in North Carolina.

Q And to your knowledge, did anybody pass that information on?

A I don't know, sir. I never received any information pertaining to the John Stoneman bombing in Richmond that would allow me to obtain an indictment.

Q And so even though it was your intent that somehow this get – information be spread, you didn't do anything to

make sure that any individual witnesses learned of anything about Mr. Gaylor being released?

A Well, I contacted various witnesses in Richmond, Virginia, over which I was the case agent, yes. It was widely publicized in the paper as to his pending release. But I received no information.

Q Do you know whether the West Virginia authorities responded or how they responded?

A No, sir, I do not.

Q Do you know whether Mr. Hayes, the Prosecuting Attorney; or Mr. Lorensen, I believe, came in '87, I believe, that Mr. Lorensen did anything with that information?

A No, sir, I don't know that.

THE COURT: Do you know if they received information?

THE WITNESS: I personally did not call them. Although, I contacted the ATF in West Virginia, as well as, I believe – at that time I believe Trooper Kochenderfer had been promoted to Lieutenant, I think, and was stationed in Lewisburg. I know that during the course of this period of time he had moved from a trooper and been promoted. And this information, I believe, was passed along to him. (Mr. Detch)

Q If I understand it, you were then asked to go and appear before the Parole Board; is that correct?

Q But you have no reason to believe the Prosecuting Attorney of Greenbrier County did not get a copy of this report?

A I would assume that they did, yes.

Q Now, after – I think your testimony is, after you went in May of '78 to Richmond, did you write any further reports?

A No. I also testified to that. I did not write any further reports that was covered by the federal people.

Q So if I understand your testimony, after you wrote the report, you were just allowing the Feds to handle this case; is that correct?

A Generally, yes.

MR. BRUCE: Thank you.

THE COURT: Is that all you have, Mr. Bruce?

MR. BRUCE: Just one closing question.

Q Obviously today, you have had trouble remembering things back in 1976 and '77; is that correct?

A Yes.

Q If this case would have been brought in '77 or 1978, would your memory have been better?

A Probably.

MR. BRUCE: Thank you.

A Discussed it with ATF agents, but I do not recall discussing it with FBI agents.

Q How many ATF agents did you discuss it with?

A I think that there was three. I think Jerry Neal, and a gentleman by the name of Wysocki, and Beck.

Q Now, your report of investigation is dated March 1, 1976. That's approximately five weeks after the murder; is that correct?

A Yes, sir.

Q Did you prepare any other reports or is this it?

A I think this is it.

Q Do you recall working on the investigation much after you prepared your report?

A No, sir. At the time the report was prepared, that generally took care of all the leads that we had to pursue at that time.

Q Did you discuss your findings with the Prosecuting Attorney of Greenbrier County at the time, Mr. Edgar Lewis Smith?

A Yes, sir.

Q Did you and/or Mr. Smith make a determination of whether you had enough evidence to pursue an indictment against anyone for that murder?

A During that conversation – At that time, there was

no death penalty in West Virginia. But if I remember correctly, there was a death penalty in a federal statute for this type of crime. And with Mr. Smith's blessings, we decided that we would go with the federal system, that in the event we were able to get a conviction, there would be – for the capital offense, and that he relinquished, you know, the –what would I say, the ability to prosecute – not the ability to prosecute, but the choice to prosecute in lieu of turning it over to the U.S. Attorney's Office.

Q What you are saying, , he deferred to the Federal people on this case?

A Yes, sir.

Q Did you make any investigation as to whether there was a federal murder statute?

A I am just repeating from memory what I think I remember from conversations with the ATF agents.

Q Did you have any direct conversations with anyone in the U.S. Attorney's Office?

A No, the ATF agents were that liaison.

Q To your knowledge, was anyone ever prosecuted by the federal prosecutors for the murder of Billy Ray Abshire?

A Not to my knowledge.

Q At the time of this investigation, you had been in the State Police about ten years?

A Date of this is June 25th, 1981.

Q And there is another reference to Clayton Gaylor there, is that correct, second paragraph of that report?

A Yes, sir.

Q Would you read that, please?

A "Clayton Gaylor, Gene's brother, is presently free and residing in the western part of Virginia. He is apparently keeping a low profile and abiding by the conditions as set forth by his parole."

Q Now, there came a time when you closed this investigation, was there not?

A Yes, sir.

Q And I want you to turn to the last page of Tab 7, and what's the date of that report?

A The date of this report is September 30th, 1981.

Q And could you read the second paragraph there, please?

A "The suspect, Gene Willard Gaylor, is currently serving a 40-year penitentiary sentence in the Federal Reformatory, Leavenworth, Kansas, after being convicted of extortion, four counts, and attempted jail break. Gaylor was sentenced under a Dangerous [Special] Offender for the attempted jail break and sentenced to 20 years in the federal penitentiary, thereby giving him 40 years, 20 for extortion and

20 for the attempted jail break.

"In view of the above, it is requested that this investigation be closed. In the event new information is forthcoming, this investigation will be reopened."

Q So in view of the fact that he – Gene Gaylor was sentenced to what you considered to be a 40-year penitentiary sentence, you closed this investigation; is that correct?

A I closed my investigation, yes, sir.

Q And it's safe to say, Mr. Baxter, that when you closed that investigation, to your knowledge all information that you just reviewed got communicated in some fashion to the State of West Virginia?

A If I felt that the information was significant, I would communicate it myself to the State of West Virginia. Yes.

Q Now, and most certainly as we see here today, that information was readily discoverable by the State of West Virginia, wasn't it? From you?

A Oh, yes, sir, um-hm.

Q So all they really had to do was to call you up on the phone and ask you the questions concerning this; is that correct?

A That's correct. Very often they wouldn't have to call me, I would call them.

Q So did you keep in contact even after the grand jury proceedings in May of 1978 in Richmond, you kept in contact with the West Virginia authorities, did you not?

A When I closed my investigation, I did no further investigation on this matter. The only additional thing that came up was, I think, in 1988 when Mr. Gaylor was due to be released on the parole hearing. At that time I received telephone calls from the Assistant U.S. Attorneys and the Parole Commission in Springfield that they wanted me to come out and testify as to various acts involving Mr. Gaylor. And that's what I did. I received no further information, nor did I communicate with West Virginia, until such time as Trooper Spradlin called me, I believe in July of this year or last year.

Q So the last contact you had with anybody in the State of West Virginia concerning this matter, I mean before Trooper Spradlin called you, was when?

A Probably during – I'm not real sure. Probably during the parole hearings. I don't know if I communicated with anyone in West Virginia during that period or not. They requested that Trooper Tillette and I go to Missouri, which we did.

Q Okay. Now I want to make sure: To the best of your recollection, when was – Prior to Trooper Spradlin calling you

that I think the Feds, whether it be the ATF or somebody, had done some investigation on it. But we weren't privileged to any of it. It was just discussion amongst us.

Q Was Clayton Gaylor's name mentioned during that time period when you talked to Mr. Kochenderfer?

A Yes, sir.

Q And what was that conversation about, about Clayton Gaylor?

A Kochenderfer made the statement that Gene Gaylor was the person that killed Billy Ray Abshire. I mean, that was the discussion amongst – In other words, he was convinced that he was the person that planned the bombing. I mean, that was our –

Q And he was convinced of that fact in his investigation?

A Yes, sir.

Q You mentioned Clayton Gaylor, his brother. What was the conversation about Clayton Gaylor?

A I am sorry. I don't remember any discussion about Clayton.

Q Did you ask Mr. Kochenderfer about Clayton Gaylor?

A No, sir.

Q Do you know of any other West Virginia – besides you, any other body of investigative offices in the State of

Cross (Detch) - Spradlin

Q Now then, you indicated that – if I understood it correctly, that there were two things that you found that were new in this particular case. One was a statement of a Carol Gaylor.

A I was – As far as I know, I was the only person to ever interview Carol Gaylor from the State Police.

Q When did you interview her?

A Friday, August 14, 1998, about three o'clock in the afternoon.

Q And Clayton Gaylor. When did you interview him?

A Sunday, August 16th, 1998, about ten o'clock in the morning.

Q Now then, is that what you would consider to be the new evidence that you have gained that the State didn't already have for almost 20 years, those two statements?

A – Well, in my opinion, those statements were pretty powerful.

Q But those are the two statements?

A Those are two of the people that were never interviewed by the State Police.

Q Now then, the grand jury that met in August 27th of 1998 was called for the purpose of indicting Gene Humphries and the Gaylors, and primarily for the purpose of this murder indictment?

A Yes, sir.

Q And you began your investigation – serious investigation at least on July 3rd?

A Correct.

Q Could you explain why the grand jury was summonsed and the Order was issued then on July 22nd of 1998?

A I think – I don't know that it was. I don't know.

MR. BURNETTE: Your Honor, it's the Prosecuting Attorney who asks the Judge to call a special grand jury. Officer Spradlin can't answer that. I am the one who asked Judge Jolliffe to call the grand jury.

THE COURT: If he can't explain it, he can't explain it.

MR. DETCH: May I approach the witness?

THE COURT: Sure.

MR. DETCH: Mark this.

DEFENDANT'S EXHIBIT NO. 5

(A document was marked for identification as above indicated.)

Q Officer Spradlin, if I hand you a Court Order signed by Judge Jolliffe, dated July 22nd, 1998, summonsing a grand jury for August 27th –

MR. HANSON: Your Honor, I object. Officer Spradlin just testified he didn't know anything about this. Mr. Detch continues to ask the same question.

Q Now then, you indicated that – if I understood it correctly, that there were two things that you found that were new in this particular case. One was a statement of a Carol Gaylor.

A I was – As far as I know, I was the only person to ever interview Carol Gaylor from the State Police.

Q When did you interview her?

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Q But those are the two statements?

A Those are two of the people that were never interviewed by the State Police.

Q Now then, the grand jury that met in August 27th of 1998 was called for the purpose of indicting Gene Humphries and the Gaylors, and primarily for the purpose of this murder indictment?

Q And you have undertaken and uncovered a multitude of evidence, but can you tell me the evidence that you have discovered during your investigation that was not available or not known in 1976 or 1978, or any time prior to 1998?

MR. ANDERSON: I object to the form of the question, Your Honor. There is no foundation on what was known or not known by him in 1976 about this investigation.

THE COURT: I thought he indicated he didn't know anything about it until 1998. He didn't know anything about it until 1998. Go ahead.

A Carol Gaylor had never been interviewed. Found her and interviewed her. Clayton Wayne Gaylor had never been interviewed, and I interviewed him. And of course, after the arrest, statements were made, not incriminating statements towards themselves, but statements were made by each one of the people involved.

Q Were some of the statements made by each of the defendants, were some portions of those incriminating?

A They never said "I had Billy Ray Abshire killed," or "I killed him," but they said "I have an opinion about who did it, and this is my opinion."

Q But did some of the things that they said, maybe not directly, but did some of the things that the defendants said in their statements, did they tend to point to one or the other.

Q Have you been given any promises from anyone concerning –

A I just answered that question a while ago.

Q I will ask one final question and I will pass this witness, unless Mike has something from our client's perspective.

So I understand, any knowledge that you had about this case, you had since 19 – at least 1976, is that correct? About the Abshire case, any knowledge you had concerning that case, you have had since 1976?

A Yes.

Q And at least since the time that you wrote to Judge Turk?

A Yes.

Q And the time that you asked to talk to some officials and people came in jail – prison to visit you?

A Yes.

Q You have been willing to talk about this case.

A Yes.

MR. BRUCE: No further questions.

MR. ANDERSON: I just want to –

BY MR. BRUCE:

Q A follow-up question to that is: There is nothing, no information you had heard or gained recently

the other one until just two weeks ago.

UNDISCLOSED GRAND JUROR: Why hadn't this been brought to court before?

THE WITNESS: Well, we didn't have Clayton Gaylor before, to start with. There was several jurisdictions involved: the State of North Carolina, State of Virginia, and the State of West Virginia. The federal government had jurisdiction in the bombing. They were called in to help. However, they only have a five-year statute of limitations, is my understanding. And I think, according to Morgan Scott, the U.S. Attorney who prosecuted Mr. Gaylor, everybody was cheering him on for the - - - putting Gaylor in jail for the extortion. But, you know - - I don't know - - I don't know - - I don't know. I can only speculate they felt they didn't have enough at that time. But again - - keep in mind, law enforcement in West Virginia did not know about the payment after Abshire. That never came out. Mr. Humphries never volunteered that to anybody until the bomb went off in his front yard. In fact, he didn't volunteer that until Mr. Gaylor started trying to get immunity for himself, and then all of a sudden, this story about the Las Vegas divorce came up. But that was never mentioned by Mr. Humphries whatsoever. So that was one thing. And then Clayton Gaylor wasn't beating the doors down either, telling anybody about the payment he saw at the Holiday

Inn. That was two crucial pieces of evidence. Plus, it was a complicated case. It was - - you know, these cases are not easy.

MR. BURNETTE: Mr. (_____) ?

UNDISCLOSED GRAND JUROR: Yes. First question: The bomb that didn't go off, is there any fingerprints, anything like that on that one?

THE WITNESS: Well, they admitted - - the - - Robert Vernon Brown and Gene Gaylor both admitted putting that out there. So I don't think there was. Any they were never suspects in this thing until Gene Gaylor talked to the U. S. Attorneys in Roanoke, Virginia.

MR. BURNETTE: Which is two years later?

THE WITNESS: Which was two years later.

MR. BURNETTE: He was trying to get out of the extortion case, trying to make a deal, and that's when he became a suspect in the other bombing.

THE WITNESS: Right. He was facing some heavy-duty-time, and he was trying to test the waters to see, you know, if he could get a reduction of sentence and so forth. And it backfired, and he ended up being indicted in state court in Virginia on the bombings. There was a suppression hearing.

But bottom line is, it never went to trial because these guys who are afraid of Gene Gaylor refused to testify against him.